

No. 15005

United States
Court of Appeals
For the Ninth Circuit

THE FLINTKOTE COMPANY, a Corporation,
Appellant,

vs.

ELMER LYSFJORD and WALTER R. WAL-
DRON, Doing Business as Aabeta Co.,

Appellees.

Transcript of Record
In Three Volumes

Volume II
(Pages 433 to 852)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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(Testimony of Howard Carlton Smith.)

Cross-Examination

By Mr. Black:

Q. Do you recollect how long before you got your first shipment of tile from The Flintkote Company that you had taken on the line, so to speak?

A. It would be difficult for me to give you that answer. I am certain I could get it from our records. I could not give you that answer myself.

Q. If our records indicate that the first shipment of tile made by the Flintkote people to your company was June 3, 1952, would that help you in any way to establish the date when you formed that connection with Flintkote?

Mr. Ackerson: If your Honor please, I think there should be a foundation as to whether this man had anything to do with the purchase. There is no proper foundation laid for this question.

Mr. Black: He purported to testify from memory and he [328] was in the company at the time. I am just trying to discover the dates of the——

The Court: Counsel is making statements to see if it refreshes the witness' recollection.

Mr. Ackerson: I will withdraw the objection, if the witness knows.

Mr. Black: We can establish it.

The Court: If you can't answer the question, just say so.

The Witness: It doesn't. I couldn't give any positive answer, one way or the other.

(Testimony of Howard Carlton Smith.)

Q. (By Mr. Black): And as a point of fact, you are not sure about that February date, are you?

A. No, sir.

Q. It could have been a couple of months later?

A. It could have been months later or months earlier.

Mr. Black: That is all. Thank you.

(Witness excused.)

Mr. Ackerson: If your Honor please, these documents have been produced and I have agreed to stipulate that the originals may be withdrawn upon the substitution of photostats, the usual stipulation, by either party. Is that satisfactory with the court?

The Court: Satisfactory with the court if it is with the parties.

Mr. Black: Yes, it is with us. Of course, reserving [329] all objections to the admission of them.

Mr. Ackerson: It is just a stipulation. Some of these contracts they may need and there would be no impediment to their access to it.

Mr. Black: There will be no argument it is not the best evidence.

The Court: As I understand it, if anyone needs the original—that would have to come through you, Mr. Ackerson, as you brought them in here—you appear and arrange with the clerk to photostat it and we will accept the photostat in lieu of the original.

Mr. Ackerson: Yes.

Mr. Black: That is perfectly satisfactory.

Mr. Ackerson: Now, your Honor please, that concludes the duces tecum witnesses. I will call Mr. Lysfjord.

ELMER LYSFJORD

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. Your full name, please?

The Witness: Elmer Lysfjord.

Direct Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, will you keep your voice up?

A. Yes, sir.

Q. You may think you are talking loudly on the stand [330] there, but it is difficult to tell until we can hear you.

You are one of the plaintiffs in this instant proceeding, are you not? A. Yes, sir.

Q. Mr. Lysfjord, what has been your experience in the acoustical tile contracting field? When did you first start in the field? What was your early experience?

A. In 1941 I worked as an applicator, a carpenter installing the tile.

Q. Who was that for?

A. Harold E. Shugart Company.

Q. Was that here in Los Angeles?

A. In Los Angeles.

(Testimony of Elmer Lysfjord.)

Q. Have you ever had any experience in the acoustical tile field in any other area than Los Angeles?

A. I worked for about a year or maybe a year and a half in Chicago in the same field.

Q. And that was prior to your experience with the Shugart Company? A. Yes, sir.

Q. How long did you work for the Shugart Company as an applicator?

A. Approximately about five years.

Q. That was from what, 1941 to '46?

A. I would say so, yes. [331]

Q. Then what did you do?

A. I was a salesman for the Coast Insulating Company. However, that might be 1947; I am not too sure. [332]

Q. As to the dates, I just want relative dates unless it becomes important to make them more definite.

Anyway, you left the Shugart Company as an applicator and you became a salesman for Coast Insulating Products? A. Yes, sir.

Q. Then how long did you continue on that job as a salesman? A. Approximately a year.

Q. And that would bring us up to around when, 1948 or thereabouts? A. Thereabouts, yes, sir.

Q. Then what did you do?

A. Became a salesman for the Downer Company, Howard W. Downer.

Q. That is the Howard——

A. R. W. Downer Company.

(Testimony of Elmer Lysfjord.)

Q. What did you do for the Downer Company? You said you were a salesman for the Downer Company? A. Yes.

Q. How long did you remain a salesman for the Downer Company?

A. As near as I can recall, it was about January, the end of January of 1951.

Mr. Black: '52, don't you mean?

The Witness: I beg your pardon. '52. [333]

Mr. Ackerson: Thank you, Mr. Black.

Q. Then I take it you went into business for yourself? A. Yes, sir.

Q. Mr. Lysfjord, while you were with the Downer Company, can you give us an estimate at the present time of your monthly earnings from that company?

A. Well, I can't recall the first years, however, the last year it was somewhere around \$1,200 to \$1,400 a month.

Q. And those earnings consisted entirely of commissions, did they not? A. Yes, sir.

Q. In other words, you didn't draw a salary there, did you? A. No, sir.

Q. All the pay you got was from commission work? A. That is true.

Q. If you sold no job, you got no pay?

A. That is true.

Q. Now, prior to January 1, 1952, had you made any attempts to go into business for yourself by way of getting a line of acoustical tile?

A. I had tried for several years to interest some-

(Testimony of Elmer Lysfjord.)

body in selling me acoustical tile without too much success, until such a time as I talked to Mr. Ragland.

Q. Do you recall any of these people that you contacted [334] in this respect?

A. Oh, yes. Mr. Robert Huebleine.

Q. What company was he with?

A. Armstrong Cork.

Q. Would you spell that for the reporter?

A. H-u-e-b-l-e-i-n-e, I believe.

Q. What did Mr. Heubleine tell you? By the way, when did you contact Mr. Huebleine, approximately?

A. Probably in 1950, '51, somewhere in through there.

Q. What did Mr. Huebleine do, did he sell you the line or not?

A. No, sir. He said that all our materials are sold on franchise and we don't believe that we can sell you.

Q. Did you contact anybody else, any other line of acoustical tile?

A. Mr. McClave of the same company, and I got the same answer.

Q. Did you contact any other companies?

A. The Simpson Logging Company.

Q. Is that the Simpson brand of acoustical tile?

A. Yes, sir.

Q. That is the manufacturer? A. Yes, sir.

Q. How did you contact them? Who did you contact there? [335]

(Testimony of Elmer Lysfjord.)

A. I forget the man's name. However, I recall the place. It was their office and warehouse on Washington Boulevard near Alameda.

Q. When was that approximately? What year, Mr. Lysfjord?

A. Somewhere in the same year, '50.

Q. What was the result of that, negative?

A. Yes, sir.

Q. Now tell us about when you first started contacting The Flintkote Company for a line of acoustical tile?

A. Well, I believe it was somewhere in July of 1951.

Q. Who did you contact?

A. Mr. Robert Ragland.

Q. How long have you known Mr. Ragland?

A. Probably 10 years.

Q. Where did you first meet him?

A. He used to work for me at the Shugart Company.

Q. As an applicator? A. Yes, sir.

Q. When you say he used to work for you, I take it that you probably were a foreman and he was under you, is that right? A. Yes, sir.

Q. And how long did that relationship continue?

A. Oh, probably a few years. [336]

Q. During what period was that, Mr. Lysfjord?

A. Somewhere around 1942 or '3, I would say.

Q. '42, '43, '44?

A. Maybe up as high as '45. I don't recall exactly when I first met him.

(Testimony of Elmer Lysfjord.)

Q. And did you continue to have associations with him subsequent to that time?

A. I believe we have been fairly good friends in the past.

Q. In other words, you met him back in '41, '42, or '43, and you have been fairly good friends ever since? A. Yes.

Q. Did you see him quite frequently?

A. I would say probably once a week.

Mr. Black: Did you say did you or do you?

Mr. Ackerson: Did you.

Mr. Black: Thank you.

Q. (By Mr. Ackerson): How long did Mr. Ragland remain with the Shugart Company, up until the time you left?

A. It is a little hard for me to say exactly when he left. However, he became a salesman for the company and I didn't see him quite as frequently as I had done before.

Q. Was that after you left the Shugart Company or before? [337]

A. He was still a salesman at the Shugart Company at the time I left the Shugart Company.

Q. I see.

Then let us get back to these conversations or this conversation which you had with Mr. Ragland some time in July, 1951. Where did that conversation take place, if you recall? [338]

A. The first time it was probably over a cup of coffee at the nearest contractor's office that we had met at.

(Testimony of Elmer Lysfjord.)

Q. You mean near his contractor's office?

A. No, a contractor's office. In other words, he was selling acoustical tile and so was I at that time.

Q. So it was a casual meeting at that time?

A. Yes. I beg your pardon.

Q. We are talking about July, 1951.

A. Yes. No, I was going back to the time when he was a salesman and so was I in our meetings.

Now you are referring to when I was inquiring about getting an acoustical tile, is that right?

Q. From The Flintkote Company.

A. Then it was in July of 1951.

Q. Do you know how long Mr. Ragland has been with The Flintkote Company at that time?

A. No, sir, I do not.

Q. But he was with The Flintkote Company in July of 1951? A. Yes, sir.

Q. And he was in the acoustical tile part of the Company? A. Yes, sir.

Q. Where did this meeting in July, 1951, take place, Mr. Lysfjord? [339]

A. Well, probably in some cafe having a cup of coffee.

Q. Do you recall what was said?

A. Well, it was my usual question—what do you think you can do about getting some acoustical tile for me? I had been asking everybody I could meet for many years as to how I could get it.

Q. Did he give you any encouragement, if he did, or just say what he told you?

(Testimony of Elmer Lysfjord.)

A. He said, "I will do everything in my power to get acoustical tile for you because I think you would do a good job for us but I can't tell you anything at this time one way or the other."

Q. Did you have a subsequent meeting or meetings with Mr. Ragland on the same subject matter?

A. Well, I probably met him half a dozen times before anything was actually brought to a point where I became elated in the fact that there was a possibility.

Q. You mean you probably met him a half a dozen times after July, 1951? A. Yes, sir.

Q. And when was the first meeting that you recall that you would call a serious meeting? You have mentioned when you became elated or hopeful. When did that occur?

A. Well, at one of these meetings he mentioned that he also covered—I mean by "he," Bob Ragland—covered the [340] northern part of the area here, or Northern California, and he thought that I could get a line there very easily if I were interested.

And I told him that I don't think that I would be interested in moving out of California because I had all my background and contacts right here in Los Angeles, and it would be rather difficult to go that far from home.

He said, "Well, I will just have to go and try again and see if I can get you in here in the Los Angeles area."

(Testimony of Elmer Lysfjord.)

Q. Can you state whether or not that was before or after August, 1951?

A. Much before August.

Q. Did you have a subsequent meeting with Mr. Ragland concerning the same subject?

A. Well, yes, he called me one day and said that he had been able to interest his company in the fact that I would like to have acoustical tile, and if I would be interested he would like to introduce me to a Mr. Baymiller.

Q. Can you tell us about when that was, Mr. Lysfjord, the month?

A. We are probably getting up into August now.

Q. Did you have such a meeting? A. Yes.

Q. And can you state approximately when and where?

A. In the month of August at the Manhattan Club. [341]

Q. Do you think it was the month of August? And where is the Manhattan Club? Is that the same club that your associate mentioned in his testimony? Did you hear that part of your associate's testimony? A. Yes, sir.

Q. The same club? A. The same club.

Q. Where is the Manhattan Club with respect to the Flintkote Company's offices? How far away?

A. Oh, probably five miles, I would judge.

Q. Where is it with respect to the first location of the aabeta company in Los Angeles?

A. Not much further.

Q. About the same distance?

(Testimony of Elmer Lysfjord.)

A. Same distance.

Q. Tell us about this meeting at the Manhattan Club and tell us, if you can, the substance of the conversation, who was there, what was said, what was done?

A. Well, I met Mr. Baymiller in the company of Mr. Ragland and——

Q. Who arrived there first? Were they there when you got there or did you precede them, or how did you get there?

A. I drove my car there. I don't recall.

Q. Did you go alone?

A. I went alone; yes, sir. [342]

Q. Do you recall whether Mr. Ragland, Mr. Baymiller, whether they were there when you arrived, or did you get there first?

A. It is a little difficult to say.

Q. Anyway, you all three arrived sooner or later? A. Yes, sir.

Q. Now proceed. I am sorry I interrupted. What was said and what was done?

A. Well, Mr. Ragland introduced me to Mr. Baymiller and said, "This is the fellow that I had in mind for handling our acoustical tile."

Mr. Baymiller shook my hand and we probably only talked about things to get acquainted with at that time, not discussing any tile, whether I was to get it or not. I think it was just to make an acquaintance of me at that time, to see what Mr. Baymiller thought of me at that time.

Q. Thought of your appearance, personality, or

(Testimony of Elmer Lysfjord.)

what? A. Possibly appearance.

Q. Did Mr. Baymiller at that time inquire into your experience, if you recall?

A. Well, rather superficially, just that Ragland said I had done a very good job in selling in the area and he was aware of it because at one time he was a competitor of mine and that he—I keep saying “he”; I should use names—Bob Ragland said again he was trying every effort on his part [343] to get a line for us in the Los Angeles area, and again Mr. Baymiller mentioned, “Well, I really can’t say for myself because we have to clear through the home office.” [344]

Q. Well, is that about the generalities that were discussed at this first meeting with Mr. Baymiller?

A. I would say so.

Q. How did the meeting break up? Was there arrangements for a subsequent meeting or was it left at that?

A. Well, Mr. Baymiller said he was very pleased to meet me and he thought perhaps he could do me some good, but he couldn’t give me any definite answer until he had checked further with his company.

Q. Was Mr. Waldron’s name brought up at that meeting, do you remember?

A. Not that I recall.

Q. It was strictly a meeting between the three of you, interrogation of yourself or inquiry of you?

A. Yes.

(Testimony of Elmer Lysfjord.)

Q. When was the next time you had a meeting with Flintkote representatives?

A. A matter of a week or two later at the same place.

Q. Who attended that meeting?

A. Mr. Waldron, Mr. Baymiller, Mr. Ragland, Mr. Thompson and myself.

Q. What time of day was that? A. Lunch.

Q. You said it was at the same place?

A. Yes. [345]

Q. Manhattan Supper Club? A. Yes, sir.

Q. Is that sort of in between your two offices or is it beyond your office or beyond their office?

A. I really don't know, sir, only that they suggested it and I had no reason to not want to go there.

Q. Tell us what occurred at that meeting. I thought maybe it was a special haunt of one of these people, either you or Mr. Waldron or Mr. Baymiller or Mr. Thompson or Mr. Ragland.

Tell us what happened at this second meeting, Mr. Lysfjord. You have five of you present. It is lunch hour. If you can reconstruct, the best you can to your recollection, tell us what happened, what was said.

A. Well, at this meeting—of course, we had had a phone call before going to this meeting.

Mr. Black: I am sorry.

Q. (By Mr. Ackerson): Who called you?

Mr. Black: I didn't hear that, please, Mr. Lysfjord. Will you repeat that?

(Testimony of Elmer Lysfjord.)

The Witness: I said I had had a phone call to arrange this meeting.

Q. (By Mr. Ackerson): Who arranged it?

A. Mr. Bob Ragland.

Q. Where did you receive the call, at your [346] Downer Company? A. Yes.

Q. You were with the Downer Company at that time, were you not? A. Yes, sir.

Q. Mr. Ragland called you and you met at the Manhattan Club about noon about two weeks after the first meeting.

The people are present. Who opened the meeting and what was said?

A. Well, at this time Mr. Thompson seemed to be—should I say the monitor—in any case, he did the talking. And we just listened. He asked quite a few questions.

Q. What did he ask? What did he say?

A. Well, probably again the same as Mr. Baymiller, the background I had had in the field and the ability that I had in selling.

Incidentally, he said, “It is very nice for you to tell me you are pretty good. Let me see what you have done.”

And that is why I mentioned the phone call, because at the time Mr. Ragland mentioned if I had anything that could prove the fact I had been selling pretty well in the area it would be well if I brought it along.

Q. Did you bring it along?

A. I brought a series of contracts that I had

(Testimony of Elmer Lysfjord.)

in my possession at that time for close to \$40,000.00 worth of work. [347]

Q. That was \$40,000.00 worth of work you had sold for the Downer Company?

A. Well, I don't quite like to say for the Downer Company. I sold it for myself and we, in turn, would work together on the job.

Q. But the Downer Company, they were contracts which the Downer Company was to perform as a result of your work? A. Yes, sir.

Q. Did you show those contracts to Mr. Thompson? A. I did.

Q. Mr. Baymiller? A. I did.

Q. Who were those contracts with, if you recall?

A. The majority of them were with the firm called the Jackson Brothers. There were two or three with the Hagen-Lee Company.

Q. When you showed those to Mr. Thompson, did he say anything?

A. I think he was slightly surprised at that magnitude of contracts at one time, and he asked me if I thought that I could continue doing work with these people on the same scale.

I said I had every assurance of doing so, because I had been doing a good bit of work with these people in the past and I had no reason to doubt I could do it again. [348]

Q. Did Mr. Baymiller, during this meeting, say anything of significance, or Mr. Ragland?

A. I don't think Mr. Ragland even said a word. However, Mr. Baymiller mentioned that he thought

(Testimony of Elmer Lysfjord.)

perhaps that I would probably make a good man for his company.

Q. Well, how long did the meeting last, approximately? A. Oh, probably an hour.

Q. During the lunch hour? A. Yes, sir.

Q. Was there anything else said? Did you supply any other information or were you requested to or did they say anything or did you say anything?

A. Well, yes. They went ahead further. Mr. Thompson mentioned that they thought perhaps, or, rather, he thought their company would allow us to work here in this area, but they hadn't had adequate coverage in the outlying area of San Bernardino and Riverside.

And he said, "In view of the amount of work you have been doing here in Los Angeles, don't you think you could find time to augment some of your efforts in the San Bernardino area?"

Q. What did you say?

A. I said, "I think perhaps that could be arranged."

Q. Mr. Waldron, did he have anything to say at this meeting? [349]

A. Very significant thing. He mentioned that we were well aware that any time that he and I were to start an acoustical contractors business there would be terrific pressures brought to bear by these other contractors, to not allow us to go into this business.

And Mr. Thompson said that, as a matter of fact, he gave a little laugh and said, "Pioneer-Flintkote

(Testimony of Elmer Lysfjord.)

is a pretty big firm and I don't believe that anybody can intimidate us, and when we say something, it is to be, and that is the way it will be."

And we could be assured—we could rest assured at no time would any outside people have any influence on them.

Q. Now, Mr. Lysfjord, I take it that was Mr. Thompson's reply in response to something Mr. Waldron said? A. Yes.

Q. In other words, have you stated what Mr. Waldron said?

Mr. Black: Objected to as already asked and answered.

Mr. Ackerson: Very well, I will leave the answer as made.

Q. (By Mr. Ackerson): Now, have you pretty well covered the meeting, as you recall, or was there something else said?

A. Well, Mr. Thompson said that he felt quite sure that we would be acceptable to his company as a distributor [350] for him, or for them in the Los Angeles area, if we promised to cover, along with the Los Angeles area, the San Bernardino and Orange County area. But that the final say-so would depend on whether we had a financial statement large enough for acceptance to their credit manager.

He instructed us to prepare one and bring it to The Flintkote Company, and that they would call us in a short time and tell us exactly what the verdict was or what their opinion was.

But we were led to believe—we weren't even only

(Testimony of Elmer Lysfjord.)

led to believe, but he told us we had a hundred per cent chance of being their distributor.

Q. That financial statement, I take it, is the same financial statement that has been introduced in evidence here, as I believe it is Plaintiffs' Exhibit 1.

Is this the financial statement that you had prepared as a result of that conversation?

A. Yes, sir.

Q. That statement was subsequently submitted to the Flintkote Company officials, is that correct?

A. Yes, that is correct.

Q. Now, have we about covered that meeting?

A. I can't recall anything else at this time.

Q. When did you next hear from either Ragland, Baymiller or Thompson? [351]

A. Shortly after that I got a call to appear at the office of The Flintkote Company, in the presence of Mr. Waldron, or bring Mr. Waldron with me. I don't recall if he got a call, too, but I was told that the two of us were to be there.

Q. About how long after this last Manhattan Club meeting was that?

A. A matter of a week or two.

Q. Can you give us approximately the month or the time of the month of this meeting we are leading to now?

A. I would say somewhere in November; perhaps the latter part of November.

Q. Did you and Mr. Waldron attend this meeting?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. Where was it held?

A. The Flintkote offices.

Q. That is down on Alameda, is it?

A. Yes, sir.

Q. Who was there besides you and Mr. Waldron?

A. Mr. Thompson, Mr. Baymiller and Mr. Ragland.

Q. Now, will you just tell us, try and reconstruct the meeting, who arrived, and when you arrived what you found there, and who was there when you arrived, and which office you went to, and what was said and who said it?

The Court: Let's get all the foundation and then we [352] will take a recess, before he gets to the conversation.

Mr. Ackerson: Very well.

Q. (By Mr. Ackerson): The meeting took place around the latter part of November, to the best of your recollection? A. Yes, sir.

Q. Who attended the meeting?

A. Mr. Ragland, Mr. Baymiller, Mr. Thompson, Mr. Waldron and myself.

Q. And did you also see Mr. McAdow at that meeting?

A. A little later on in the day, yes, sir.

Q. Did you see Mr. Harkins at that meeting?

A. Yes, sir.

Q. It was at The Flintkote Company office?

A. Yes, sir.

The Court: Did you see anyone else there?

The Witness: A good number of the office per-

(Testimony of Elmer Lysfjord.)

sonnel, but no names that would be pertinent to this conversation.

The Court: We will recess until 20 minutes before 4:00.

(Short recess taken.) [353]

The Court: Do you want the answer to the last part of the question or do you want to put it over?

Mr. Ackerson: The last?

The Court: Do you want the answer to the last part of the question or do you wish to ask it again?

Mr. Ackerson: I will put it over, your Honor.

Q. Did you state that Mr. Ragland arranged this meeting, as far as you were concerned?

A. Which meeting?

Q. This meeting at the Flintkote Company's offices where we left off? A. Yes, sir.

Q. Mr. Ragland called you? A. Yes, sir.

Q. When you and Mr. Waldron arrived at the Flintkote offices, whom did you find there?

A. I believe it was Mr. Baymiller and Mr. Ragland and a few minutes later Mr. Thompson arrived.

Q. Did they have separate offices there, and if so whose office did you go to?

A. I was under the impression it was Mr. Thompson's office.

Q. And those three people followed you and Mr. Ragland or at least all five of you went in there?

(Testimony of Elmer Lysfjord.)

A. We met him there at that office and shook hands and he mentioned that he thought we were adequately financed to do the job that they expected of us.

Q. Let me ask you, did you have your financial statement, Plaintiffs' Exhibit 1, with you at that time?

A. I believe that was the time that it was presented to him; yes, sir.

Q. In other words, it was presented to Mr. McAdow either at that time or at a different time?

A. Yes, sir.

Q. And it is your recollection that it was at that time? A. I believe so. [357]

Q. What did Mr. McAdow say, if anything, and what occurred thereafter?

A. Only what I just stated, he thought we were adequately financed.

Q. Then did anything else happen at the Flintkote offices that day?

A. Mr. Baymiller then took us from Mr. McAdow's office to a Mr. Harkins' office.

Q. Do you recall who Mr. Harkins was?

A. As I understood it, he was the manager of all the Flintkote products in the western area.

Q. Did you understand he was Mr. Thompson's and Mr. Baymiller's and Mr. Ragland's superior?

A. Yes, sir.

Q. What occurred when you arrived at Mr. Harkins' office? By the way, where is his office, do

(Testimony of Elmer Lysfjord.)

you recall, with respect to Mr. Thompson's office or Mr. McAdow's office?

A. Well, it was around the perimeter of the general large office. I mean each had an office somewhat separate from the other, but all on the perimeter of this larger office.

Q. All right. Go ahead and tell us what occurred in Mr. Harkins' office.

A. Mr. Baymiller introduced Mr. Waldron and myself to Mr. Harkins and then he left. [358]

We were invited to sit down and talk with Mr. Harkins, and he, to me, seemed quite expansive in his conversation, as to, "It is a wonderful thing to be a young man and go out in the world and fight and make a mark for yourself," and that sort of thing.

He went along a little further and mentioned he had started from the bottom and worked up into the position he was in. And he thought that there couldn't be any reason why we couldn't do the same and that the Flintkote Company would do everything within their power to help us along the line.

And that although he wasn't too familiar with the acoustical tile field itself, that they were making every effort to make a finer tile, a better tile and they were at that time, I believe, working on a fissured tile, one type of material they did not have. And they felt, that in the very near future, they would have that and also supply that to other dealers, including us.

He also mentioned a contract that he either

(Testimony of Elmer Lysfjord.)

obtained or he had influence in getting on roofing for a quite large area, the Ryan Aircraft, east of town here.

Q. Are you sure of the name of the company, Mr. Lysfjord? I mean the Ryan Aircraft name, are you pretty certain of that? A. Well——

Q. Or could it have been another job? [359]

A. Well, it is possible. However, I know where the job is and I could go look at the name on it, if that were real important.

Q. Where is the job?

A. East of L. A., between here and Pomona.

Q. At any rate, what did Mr. Harkins say about that, other than that the Flintkote Company had supplied the roofing or was going to supply the roofing?

A. He said there was a great deal of acoustical tile in that job, in that, and he thought it might be a very opportune time for our company to see what we could do to prove ourselves, and that he was well acquainted with the contractor; the contractor's name, which I am very certain of, was Buttress & McClelland. They are on East—rather, West Beverly Boulevard here in Los Angeles. And if we felt in any way he could help us in obtaining that contract that he would be very happy to do so.

There was a general shaking of hands and good will, and "Go out there and fight," sort of thing and "Do a good job," and then we left.

Q. Now, you mentioned stationery. Did you at that time or subsequently, or both of you confer

(Testimony of Elmer Lysfjord.)

with any member of Flintkote as to the stationery requirements?

A. I talked at quite a length with Mr. Ragland, asking his opinion of what he, rather his experience on how to improve [360] the drawing that I had, if he had any suggestions, and he said he had one, and that was to use a Flintkote cut. A cut is a little printing device to put their, the Flintkote name on our stationery.

Q. Did Mr. Ragland offer to have Flintkote supply you with such a cut?

A. Mr. Ragland took me down to their advertising office and presented me with a cut.

Q. Where was that office with respect to Mr. Ragland's office?

A. Oh, somewhat down the street, in the same general area. I believe within a quarter of a block from the main office.

Q. Did you obtain a cut at that occasion?

A. I did. However, it was too large. We couldn't use it. It was a little too obvious in the size that we had allotted it on our printing.

Q. What did you do with that cut? Did you return it?

A. No. As a matter of fact, the printer still retains that cut.

Q. Did you subsequently or aabeta co. subsequently receive a smaller cut from the Flintkote Company?

A. Yes, sir, another cut was mailed by their advertising department to our Los Angeles address.

(Testimony of Elmer Lysfjord.)

Q. The Bell and Atlantic address? [361]

A. Yes, sir.

Q. Do you recall the type of envelope it came in or anything of the sort? Do you have any distinct recollection of receiving it?

A. Very much so. It was a very small, heavy manila envelope.

Q. Do you know where that cut is?

A. That, too, is at the printer's.

Q. Was that smaller cut the cut which you actually used on your stationery? A. Yes, sir.

Q. Were you here the other day at the time the Owens Roofing exhibit was introduced for identification? A. Yes, sir.

Q. Do you have in mind the green stationery which was on that exhibit? A. Yes, sir.

Q. The aabeta stationery? A. I do, sir.

Q. Is that the original, piece of the original stationery that you ordered? A. Yes, sir.

Q. Does that stationery contain this cut?

A. I believe it does.

Q. I mean an imprint of that cut. [362]

A. The small cut you are talking about? Yes, sir.

Q. Did you subsequently receive a bill from the printer for that work? A. Yes, sir. [363]

Mr. Ackerson: I am going to ask the clerk to mark this document as plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' Exhibit 36 for identification.

(Testimony of Elmer Lysfjord.)

(The document referred to was marked Plaintiffs' Exhibit No. 36 for identification.)

Mr. Black: May I see that, counsel?

Mr. Ackerson: Yes.

(Exhibiting document to counsel.)

Q. (By Mr. Ackerson): Mr. Lysfjord, I show you Plaintiffs' Exhibit 36 for identification and ask you if that is the bill you received from the printer for this original order of stationery for the aabeta company? A. Yes, sir.

Mr. Ackerson: I will offer that in evidence.

The Court: Received.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 36.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, you notice that this printer's bill is for 1,500 business cards, two colors. Do you remember on your business cards if they contained two colors? Do you recognize the billing as an apt description of the cards you received? [364] A. Yes, sir.

Q. And this statement is the same with respect to the other items on the bill?

A. I don't know if they occurred in two colors or not.

Q. 500 estimates, 500 job sheets, 500 estimate sheets, and so forth.

A. Some of these are work sheets that do not have any color on them.

(Testimony of Elmer Lysfjord.)

Q. But the cards you recall did have color?

A. Yes, sir.

Q. Now, let us get back to this meeting that you have just described in the Flintkote offices as having taken place the latter part of November, 1951. What did you do next with respect to starting in business as an acoustical tile dealer, do you recall? You talked about the stationery. What did you do next?

A. I believe the next thing I did was to obtain a phone.

Q. And where was that phone installed, or at what location did you order the phone for?

A. At the warehouse that Mr. Waldron obtained on Atlantic Avenue in Bell.

Q. Did you, yourself, apply for the installation of that phone? A. I did.

Q. Do you have any idea as to the date—I think we [365] have stipulated; we haven't stipulated as to the application date; we have stipulated January 4 or thereabouts as to the installation.

Mr. Black: As to the date of installation, that is correct.

Q. (By Mr. Ackerson): With that in mind, Mr. Lysfjord, do you have any independent recollection as to how much prior to on or about January 4th you made the application?

A. It would be in the latter part of December. The thing that recalls it to my mind is the time that Mr. Ragland contacted Waldron and myself and mentioned that we had better hurry up and buy

(Testimony of Elmer Lysfjord.)

some tile because the Hilo plant was going to go on strike and we would be without tile for our first endeavors in our business if we didn't do so.

So that became the point where we started to scurry, let's say, real quick like to establish our business.

Q. In other words, you take that point, whatever that was, the date that you ordered your original load of tile as the date when you really started getting telephone connections, and so forth?

A. We started to make every effort to make the aabeta company actually a company that could function.

Q. You were still with the Downer Company or finishing up with the Downer Company at that time, weren't you? [366]

A. I was associated with them, yes, sir.

Q. And you have mentioned this original purchase order. Can you tell us how that came about? What were the mechanics in that respect? How did you come to order? You stated Mr. Ragland told you something. How did he tell you?

A. We were notified, I guess I can only talk for myself, I was notified by Mr. Ragland.

Q. How were you notified? A. By phone.

Q. Where?

A. At the Downer office. I may not have taken it personally. However, a note was left for me or I did receive the call. In any case, I got the information that I was to be at the Atlantic office in, I believe it was, the middle of December—I don't

(Testimony of Elmer Lysfjord.)

recall the exact date—and at that time I met Mr. Waldron and Mr. Ragland there, and then he told us—Mr. Ragland told us—that the Hilo plant was closing down and that we had better do something to get some tile or we would be out of tile for some two or three months.

And we had no method or manner of obtaining any tile, purchasing it or otherwise, at that time. So we——

Q. What do you mean by that? You didn't have a purchase order blank?

A. That is correct. I don't think that we even had a piece of paper to write on at that time, just a warehouse with [367] a number on it, that is all.

So I either left by myself or we went in the same car, the three of us, down to a stationery store and purchased a small purchase order book, a very common variety that you buy for 30 cents, 40 cents, something like that.

Q. Did you make that purchase?

A. Did I make it?

Q. Yes. A. Yes, sir.

Q. All right. Go ahead.

A. From that time we went to the Plantation, a restaurant on Firestone and Long Beach Boulevard, had lunch, and Mr. Ragland wrote up the order because, frankly, we didn't know how to write up an order, we had never done so before in the manner that would be acceptable to his company.

So Mr. Ragland wrote up the order, and Mr. Waldron signed it, and there was one little incident

(Testimony of Elmer Lysfjord.)

that was pretty funny about it, I think, we didn't even put a name on it to begin with.

Q. You didn't have the aabeta company name on it?

A. At that time, no. We had lunch and then pretty soon in discussing it a little further we decided perhaps if we were going to buy something we ought to have a name on it. So then we put our name on it.

Q. Did you put the aabeta company name [368] on it? A. Yes, sir.

Q. Do you recall whether or not that book had numbered pages on it?

A. I am sure that it did have.

Q. What else occurred at this meeting where you ordered the first tile? Did you ever hear anything more about the order?

A. Well, Mr. Ragland took the original with him and we discussed the amount of area required to hold a carload of tile.

Q. At this meeting?

A. At this meeting, yes.

Q. Go ahead.

A. And our Atlantic Avenue address was a very small place, it couldn't have held 50 boxes of tile with any scaffolding that would go along with the use of it, so Waldron suggested that we use the warehouse of the California Decorating Company, a quite large area, and as we had to have the material shipped at one spot, that was the only place that we could have it shipped at that time. And we

(Testimony of Elmer Lysfjord.)

made arrangements that if we were able to locate another warehouse adequate to hold this tile that we would divert it at a later date, bring it into Los Angeles or ship it to Los Angeles.

Q. Your original shipping orders, I take it, then contained the California Decorating address in San Bernardino? [369] A. That is true.

Q. That is on Pacific Avenue over there, is that it? A. I believe that is right. [370]

Q. Very well. What else occurred? Did Mr. Ragland take the order when he left?

A. Yes, sir.

Q. And as far as you personally are concerned, did you personally change that shipping address at any time with the Flintkote people, Baymiller, Ragland or Thompson? A. No.

Q. Do you know where it was delivered?

A. To my knowledge it was directed to the Pacific Avenue address of the California Decorating Company, and then diverted from there to a warehouse Mr. Waldron had obtained shortly before that in San Bernardino.

Q. You personally did not divert it, I take it?

A. No, sir.

Q. Now, Mr. Lysfjord, did you have anything to do with the installation of telephone or listing or renting of warehouses in San Bernardino?

A. No, sir.

Q. That was Mr. Waldron's work there, was it not? I mean he did that? A. Yes, sir.

Q. Do you know whether or not Mr. Waldron

(Testimony of Elmer Lysfjord.)

made arrangements—well, the leases, I think, speak for themselves.

Now, Mr. Lysfjord, when, after you got your telephone listing and after you made your first order for Flintkote [371] tile, when did you next meet Mr. Ragland in connection with Flintkote tile?

A. Oh, I met him quite a few times in the general course of business, if that is what you are referring to.

Q. Where did you meet him? Where did you see him? Did he ever come to the Atlantic address after that?

A. Oh, yes, indeed; yes, indeed.

Q. How many times?

A. Oh, any number of times.

Q. What would be the occasion for his visits?

A. I think Mr. Ragland was generally interested in the success of aabeta co.

Q. So it was a matter of personal interest and so on?

A. I am quite sure it was that. He seemed to want to do most everything in his power to help us in any manner to become a success, and he understood the difficulty of starting a new company and the problems, little problems that come up that are not too familiar to us at the time and he offered suggestions along the line, what to do.

Q. Is there any doubt in your mind—you state positively that Mr. Ragland then was aware, at the Atlantic Avenue address, prior to, say, the middle of January, 1952?

(Testimony of Elmer Lysfjord.)

A. Oh, yes, sir, very definitely so.

Q. He had been there at that address personally in your presence prior to that time? [372]

A. Yes, sir.

Q. Do you recall a meeting at the Atlantic address with Mr. Ragland in or about that time? Give a week or a few days.

A. Are you referring to a specific meeting?

Q. Yes. Did Mr. Ragland ever come out there and inform you in anywise of any complaint about your going into business? A. Oh, yes.

Q. You recall such a meeting?

A. Yes, indeed.

Q. Where did it occur?

A. At the Atlantic Avenue office.

Q. When did it occur?

A. I just thought he was going to say something. I am sorry.

The Court: He is waiting to see that all the preliminary questions are asked and answered first, and if they are he will probably sit down.

Q. (By Mr. Ackerson): When did it occur, Mr. Lysfjord, about when?

A. The latter part of January, perhaps first of February.

Q. It was before this termination meeting?

A. Yes. [373]

Q. At least? A. Yes.

Q. And it occurred at the Atlantic Avenue address? A. Yes, sir.

Q. What was said by Mr. Ragland?

(Testimony of Elmer Lysfjord.)

Mr. Black: That, if the court please, is objected to on the ground that this question calls for the eliciting from this witness of some narrative of a past event, that the witness presumably is about to state that Mr. Ragland told him about other people making, having made complaints to the Flintkote Company.

The Court: Is Mr. Ragland contended to be a conspirator?

Mr. Ackerson: He certainly is, as an agent of Flintkote. I think the entire evidence shows it.

Mr. Black: The court please, there cannot be such a thing as a conspiracy between the corporation or its own employees or agents, unless they are acting outside of the scope of their authority. In this situation the only named defendant is the Flintkote Company.

The Court: The Flintkote Company is an artificial person. It would have to act through its officers and employees, wouldn't it?

And I take it to be Mr. Ackerson's theory that the acts of Ragland in this situation were the acts of Flintkote.

Mr. Ackerson: They certainly followed every act of [374] Ragland, including the termination date.

Mr. Black: The principle we are relying on is a simple point of law of agency. This man is shown to have been an employee of the Flintkote Company. To be sure, there is absolutely no evidence as to the extent of his authority.

(Testimony of Elmer Lysfjord.)

The question seems to call for a narration of a past event; not anything done by the declarant himself. It comes under the general rule that Wigmore states in very simple terms as follows:

“Declarations or admissions by an agent on his own authority and not accompanying the making of a contract or the doing of an act on behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being a part of the *res gestae* and are not admissible in evidence but come within the general rule of law excluding hearsay evidence, being but an account or statement by an agent of what is past or been done or admitted to have been done. Not a part of the transaction but only statements or admissions respecting it.”

That is Section 1078 of Wigmore’s text, Vol. 4.

Again on the same principle, Fletcher on Corporation, Section 735, pages 734 to 735:

“It is elementary that an agent cannot bind [375] his principal by declarations which are merely historical and which have no connection with any transaction then being conducted by him, with authority, for his principal. The principle of the exclusion of such evidence is the same as obtains in the ordinary relationship of principal and agent.

“The statements of the latter are inadmissible to affect the former unless, in respect to a transaction in which he is authorized to appear for the principal and he has no authority to bind his principal by any statements as to bygone transactions.

(Testimony of Elmer Lysfjord.)

Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties."

Now, we submit in that situation it calls for pure hearsay. No proper foundation has been laid. And that the ordinary rule of principal and agent is applicable to this situation, and the authority of this agent doesn't extend to the making of declarations of past events.

The Court: The court understands that it is offered as a present act, that is, present as of the time it was done, then being an overt act in furtherance of the conspiracy.

Mr. Ackerson: The admission of an overt act in furtherance of the conspiracy.

The Court: What date?

Mr. Ackerson: Prior to the meeting. It is prior to the termination date. [377]

The Court: Do you want to argue it, Mr. Ackerson?

Mr. Ackerson: Yes, your Honor. I think the evidence here, throughout the evidence Flintkote has shown to have acted with respect to these clients of mine through Ragland, among others. That is the only way Flintkote could act.

Mr. Ragland was nine-tenths of the acoustical management of Flintkote. I mean that was his direct job.

(Testimony of Elmer Lysfjord.)

The Court: Are you telling——

Mr. Ackerson: I don't think that is disputed. He didn't handle——

Mr. Black: On the contrary——

The Court: Does the evidence show that? If it doesn't, you had better get it in.

Mr. Ackerson: Well, that can be gotten in.

Mr. Black: I may submit——

Mr. Ackerson: I didn't think it would be denied.

Mr. Black: ——the evidence shows that Ragland had no authority whatever to make a decision, that he had to submit it in turn to Baymiller who, in turn, had to submit it to Mr. Thompson who, in turn, had to submit it to Mr. Harkins before anything binding on this company could be done.

The evidence merely shows this man was a salesman. You might as well try to argue that the ho-siery girl at Robinson's binds the president of the company. [378]

Mr. Ackerson: I am not arguing about binding the company as a corporate matter except in a case of conspiracy here. In a case of conspiracy the company has been shown, in fact, to have acted through Mr. Ragland.

These conversations are being introduced for the purpose of obtaining an admission through Mr. Ragland of the Flintkote Company of the very matters in issue, the very overt acts in issue.

I don't think we are bound by the ordinary law of ultra vires acts of an agent of a corporation. After all, I think that it is a question of what

(Testimony of Elmer Lysfjord.)

occurred at the Flintkote offices, it isn't a question of some piece of hearsay that the company couldn't conceivably rebut.

I don't believe we have to go so far as to show technical corporate authorization through the minute books of the corporation. Ragland has throughout this testimony acted for the Flintkote Company, and the Flintkote Company has done exactly as Ragland has stated it did or would do, even including the termination agreement that has heretofore been testified to.

I think we are offering it, your Honor, as an admission on the part of Flintkote, that is true, and I can go into Ragland's authority later and postpone the conversation if your Honor feels that it is necessary. But I don't think we have to go that far. Ragland has been shown to have acted [379] for the corporation, both in bringing these people together and giving them the line of supply and he has acted the same as Baymiller and Harkins, and so forth.

We could be called upon, I guess, to explain Mr. Harkins' authority or Mr. Thompson's authority for cutting these people out of their supply on the theory of Mr. Black.

Mr. Black: No, we are talking about one simple thing, your Honor please. The general rule—this is stated in *Bracton v. Bracton Fruit Juice Company*, 208 NY 492, one of the cases supporting the text—"The general rule is quite elementary that an agent may not bind his principal by declarations

(Testimony of Elmer Lysfjord.)

which are merely historical and which have no connection with any transaction then being conducted by him with authority for his principal.”

Mr. Ackerson: This is not historical. I don't like to argue the evidence in advance, but I have indicated——

The Court: The court invited it because we have great respect for Mr. Black's ability and I know he would not be urging an objection here unless he thought it a sound objection.

Mr. Ackerson: I am sure of that.

The Court: I can best test these things by hearing both of you argue them. Then you might convince me sufficiently so that you might get me to go into chambers and read a book on it. But ordinarily I am for argument if it follows [380] in its place.

Mr. Ackerson: In other words, this is an attempt, I mean one such statement I believe is already in evidence, but this is an attempt to introduce an admission in the form of an overt act, the basis, the purpose, or the subsequent overt act of termination that is directly in dispute here.

The Court: Objection overruled.

Q. (By Mr. Ackerson): Will you state your conversation with Mr. Ragland on that occasion in January or February prior to the termination meeting?

A. Well, Mr. Ragland came into the office, met me at the office, and mentioned that in his words, things were getting a little bit hot. He said that

(Testimony of Elmer Lysfjord.)

pressure that you were talking about is starting to show up. The competitors of yours in the field are beginning to pick up your figures and the fact that you are bidding against them around in this general area.

The manager of Howard Company, Mr. Howard, and Mr. Gustave Krause from Coast Insulating, a Sidney Lewis of Flintkote Company—I believe one of the principals there—and Mr. Newport, all had a meeting.

Q. Who is Mr. Newport?

A. He is a principal of Coast Insulating. All of these are Flintkote dealers, incidentally. [381]

The Court: Are you telling this as a conversation?

The Witness: I am saying what Mr. Ragland told me.

The Court: Very well.

The Witness: That they had this meeting objecting very strenuously to the fact that we were in business, the aabeta company was in business.

One of the very strongest statements was from Mr. Newport, saying that he would boycott, I believe the word was, all of Flintkote's materials and see that it wasn't used in the area, and he was willing to spend \$40,000 or \$50,000 to do it.

Mr. Black: Just one moment.

I renew our objection, if the Court please. It is now perfectly apparent that this is a narration of alleged events that are purported to have occurred in the past, that it is pure hearsay under

(Testimony of Elmer Lysfjord.)

the law and the well settled rule of substantive law of principal and agent, and that the witness is attempting to relate something that has nothing to do with any duty that Ragland was then performing but merely purports to be something that Ragland told him as to some events that had occurred sometime prior.

The Court: The witness having answered, you want to make that as a motion to strike?

Mr. Black: I make that as a motion to strike.

The Court: If so expansive a tort as conspiracy has a *res gestae* which runs over the period of the conspiracy, [382] suppose it does, this would be part of the *res gestae*.

Mr. Ackerson: It would be part of the *res gestae*.

The Court: And would be admissible then. When I say it would be part of, it would be evidence of, not undertaking to make it binding or to indicate what weight should be given to it.

The motion is denied.

Q. (By Mr. Ackerson): Did Mr. Ragland state the conversation of Mr. R. E. Howard on this occasion?

A. Only that he objected very violently. I don't recall the exact words.

Q. What about any statement to Mr. Ragland by Mr. Gustave Krause?

A. I don't recall that he said any more at that time. However, there was another meeting where

(Testimony of Elmer Lysfjord.)

Mr. Gustave Krause did state very violently what he thought of us going into business.

Q. Who told you that?

Mr. Black: That is objected to.

Mr. Ackerson: Yes, you may strike that.

The Court: Yes. Strike the part of the answer that said that he state violently.

You can't characterize a statement as expansive, violent, kindly, gratuitously, gratefully or anything else; you [383] have to just tell us what was said and the jury will have to decide with what motive it was said.

Q. (By Mr. Ackerson): Did Mr. Ragland relate this conversation to you by Mr. Krause?

A. Yes, sir.

Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?

Mr. Black: It will be understood of course that our objection runs to all of this?

The Court: Are you speaking to the objection you urged last week?

Mr. Black: Yes, the objection that it is pure hearsay, that there is no authority in the agent to narrate past events.

The Court: I will understand it but it is just the nature of things that ultimately the examination will shift to something else and sometimes these transitions are so gradual that it is a little difficult to keep track, but I understand that it runs to this one.

Mr. Black: I don't want to keep interrupting, if

(Testimony of Elmer Lysfjord.)

the Court please, but I do want our record perfected on this point.

The Court: Surely.

The Witness: What was the question again?

Mr. Ackerson: Will you read the question, Mr. Reporter? [384]

(The question referred to was read by the reporter as follows: "Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?")

Mr. Ackerson: That is concerning Ragland's conversation with Mr. Krause.

The Witness: Mr. Ragland told me that Mr. Krause came into the office and talked——

Q. (By Mr. Ackerson): Into the Flintkote office?

A. Into the Flintkote office, and talked so loudly to Mr. Ragland and pounded on the desk a little bit that Mr. Ragland got up and left and told Mr. Krause that if he couldn't talk as a gentleman he didn't want to talk to him any more, and until such time as he could behave as a gentleman, that he, Ragland, would come back and talk with him.

Q. Did Mr. Ragland say what Mr. Krause was talking about?

A. He was objecting very strenuously to the aabeta company being in business.

The Court: You cannot say he was objecting. That is a conclusion. You have to tell us what was said and then the jury can decide whether he ob-

(Testimony of Elmer Lysfjord.)

jected to something or applauded, or something in between.

The Witness: Well, I don't know how else to say it [385] because that was what he was doing.

Mr. Black: You weren't there.

The Court: That is what he was doing? You tell us what he said. Of course you cannot remember it word for word, but you can say in substance he said A, B, C, D, and so forth, and go ahead and relate the substance of the conversations. Then it will be up to the jury to determine whether that was an objection or not.

The Witness: I don't know quite how to answer that.

Q. (By Mr. Ackerson): Did Mr. Ragland—are you relating Mr. Ragland's words to you as far as the word "objection" goes, or did Mr. Ragland say Mr. Krause used other words?

A. He used the word "objected." He said, "I object very much to the aabeta company being in business, in competition with us, using the same type of tile." That is why I keep saying "objected." That is the word he used.

The Court: If that is the word he used, that is all right. I thought you were using a word which you thought his words added up to.

The Witness: Oh, no. Mr. Krause very definitely said those words, as I recall what Mr. Ragland told me, that he objected very strenuously to the aabeta company. He used the words "I object to the aabeta company being in business here in the Los

(Testimony of Elmer Lysfjord.)

Angeles area, using the same type of acoustical [386] tile that we are a dealer for.”

And that is the time when Mr. Ragland decided to leave, not wanting to listen to the loud conversation, and he told me it was loud. That is not my assumption. He said he didn't like it, so he left. He left for about 10 minutes as I understand it—or I was told rather—and then went back and talked further with Mr. Krause. What they talked further about, I do not know. [387]

Mr. Ackerson: Now, if your Honor please, I am about to change to a different subject. Is this a convenient time for our recess?

The Court: Yes, it is.

Now, members of the jury, and counsel. We have a case pending in this court, it has been pending here for about three years, which is a long time for a criminal case to pend. It concerns a person who is in very poor health, and naturally he would like to say that he is innocent, he would like to get out from under the onus of the case, and the prosecutor would like to have the issue tried, so the court has agreed to try the case short hours in keeping with the physical ability of this witness to stand about two hours a day of trial.

As a result of that we are going to start on that trial tomorrow morning at 9:30 and run until about noon, and so on, until it finishes. In looking at the file, it looks like about a two- or three-day case. It may turn out to be longer. So while we are living

(Testimony of Elmer Lysfjord.)

with that problem we will just have to spend afternoons on this case.

I will try to give you substantially the same number of hours as you would get if I were a little overinclined to take things a little easy. So we will convene at 1:30 and run until about 4:30 or 4:45, starting tomorrow.

We are adjourned until 1:30 tomorrow.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 1:30 p.m., Tuesday, May 10, 1955.) [388]

May 10, 1955; 2:00 P.M.

Mr. Black: May it please the court, I was noticing in the transcript that the citation as to Wigmore on evidence was incorrectly stated. It might have been my own fault. Just for the record I thought I had better correct that record to show that the section of Wigmore to which I referred was Section 1078.

The Court: Where does that occur in the transcript?

Mr. Black: That was almost at the end of the session last evening.

The Court: Page 375.

Mr. Black: Yes, page 375, line 22. Instead of 1075 it should read 1078, and that is in Volume 4.

Also I noticed I apparently talked too fast for the reporter to get the citation of a case I referred to, on page 380, the citation of that Brocton case,

(Testimony of Elmer Lysfjord.)

State Bank of Brocton v. Brocton Fruit Juice Company, 208 New York 492; 102 Northeastern 591.

The Court: The transcript is amended by showing the insertions that counsel has indicated.

These transcripts are sometimes used for a considerable period of time after the immediate experience of the trial. I will appreciate it whenever there are errors which are noted by counsel that you bring them to our attention so that [390] we might take care of them chronologically.

Mr. Black: Be glad to.

Mr. Ackerson: Yes.

ELMER LYSFJORD

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Ackerson:

Q. Mr. Lysfjord, during the last session of court I was asking you about your original order of stationery, and I was unable at that time to find Exhibit 4.

I am going to show you Exhibit 4 in evidence, Plaintiffs' Exhibit 4 in evidence, and ask you if this is part of the original stationery order, and I am calling your attention to a calling card, to a business card, and to a green sheet here titled aabeta company, and so forth. A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. Is that part of the original order?

A. Yes.

Q. And, Mr. Lysfjord, do you notice that on the calling card you have a two-colored job, that is, red and blue—I am slightly color-blind, but that is true, is it? A. That is true.

Q. And there are two colors on it?

A. Yes, sir. [391]

Q. And do you notice that after aabeta company you have two addresses?

A. We have two telephone numbers.

Mr. Black: Two telephone numbers.

Q. (By Mr. Ackerson): Two telephone numbers? A. Yes.

Q. Now on the sheet, the large sheet, after aabeta company do you see that there are two addresses and two phone numbers? A. Yes, sir.

Q. What are those addresses?

A. 7302 South Atlantic Avenue, Los Angeles, and 901 North Waterman Avenue, San Bernardino.

Q. And as you have stated this is the original order of stationery for aabeta company after you became a Flintkote distributor?

A. Yes, sir.

Mr. Ackerson: May I show this to the jury, please?

(The exhibit referred to was passed to the jury.)

Q. (By Mr. Ackerson): Now again calling your attention to your testimony of yesterday, Mr. Lys-

(Testimony of Elmer Lysfjord.)

fjord, I believe you stated that as a reason for ordering this first carload of tile Mr. Ragland stated to you that the Hilo plant may be closed down for repairs [392] and you should have something on hand, is that about the gist of your testimony on that point? A. That is correct.

Mr. Ackerson: Mr. Black, may we introduce this communication, a copy of a communication, which you furnished us from The Flintkote Company?

(Exhibiting document to counsel.)

Mr. Ackerson: May I have this marked plaintiffs' exhibit for identification next in order?

The Clerk: Plaintiffs' Exhibit 37 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 37 for identification.) [393]

Mr. Ackerson: I have been informed, I think the record should show, that defendant's counsel have informed me that the date on this letter was October 24, 1951. I have changed it to that by pencil interlineation.

May I offer that without objection, Mr. Black?

Mr. Black: No objection.

Mr. Ackerson: I will offer it then.

The Court: Received.

The Clerk: Plaintiffs' 37 in evidence.

(The document heretofore marked Plaintiffs' Exhibit 37 was received in evidence.)

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: I will read portions of this letter, with the understanding that this is a copy of the letter supplied to the plaintiffs at their request by The Flintkote Company.

It is in the form of a memorandum, apparently either from or to George J. Pecaro, or, from or to K. W. Sauer, Hilo. It is dated October 24, 1951, and the title is "Anticipated Hilo Operation for November and December, 1951."

"Dear George:"—so it is to Mr. Pecaro.

"Mr. Tonjes advises that our Hotwell has been promised for delivery at Hilo December 2nd. We would like to make the Hotwell installation simultaneously with the turbine inspection and I am listing below our tentative operating plans [394] for the months of November and December.

"During November, we plan to operate against incoming orders, maintain an inventory of popular stock items and slightly increase our inventory of certain acoustical tile items. Through a copy of this letter, I am asking Mr. Lewis to advise me regarding the sales department's anticipated needs for bricksiding for the month of December. If substantial quantities of bricksiding blanks are needed during the month of December, we may have to manufacture and stock this commodity during the latter part of November."

Then the letter goes on and indicates that there will be a temporary shutdown for repairs or additions.

I think it might be stated, or, stipulated, Mr.

(Testimony of Elmer Lysfjord.)

Black, that the Mr. Lewis mentioned here is Mr. Sidney Lewis of The Flintkote Company, the general sales manager.

Mr. Black: Yes.

Q. (By Mr. Ackerson): I have called your attention to Exhibit 4, which contains the Owens Roofing job estimate sheets, as written partly on the stationery we have been talking about.

Did you personally ever know either of the Mr. McLanes connected with the Owens Roofing Company? A. No, sir. [395]

Q. Have you ever met them? A. No, sir.

Q. Have you ever seen them, to your knowledge?

A. No, sir.

Q. Have you ever had any contact with the Owens Roofing Company prior to the installation of this job? A. No, sir.

Mr. Ackerson: May I have Exhibit 9?

Mr. Clerk: Yes, sir.

Q. (By Mr. Ackerson): Mr. Lysfjord, I show you Plaintiffs' Exhibit 9 in evidence, and ask you if you have ever seen that document.

A. Yes, sir.

Q. Will you state to the jury and the court where you first saw it?

A. I opened an envelope at the Bell address of the aabeta co. and took this piece of paper out of the envelope.

Q. Do you recall——

Mr. Ackerson: I think the document speaks for

(Testimony of Elmer Lysfjord.)

itself. This is the document which previously has been called to the jury's attention.

It is the request for a bid by the California University for this Santa Barbara job. It is dated January 16, 1952. It is addressed to The Flintkote Company from the University of California, and the witness has stated he received it at [396] Bell address plant here in Los Angeles.

Q. (By Mr. Ackerson): Now, we were progressing yesterday, Mr. Lysfjord, on your contacts with representatives of The Flintkote Company.

Will you describe how and under what circumstances your supply of Flintkote tile was terminated?

Give us the approximate date, if you can, how you were notified and what happened.

A. Well, I would say it was to the latter part of February—— [397]

Q. For 1952?

A. For 1952; yes, sir—or possibly the 1st of March.

I received a call at the Downer Company to meet Mr. Ragland and parties that he was to bring with him at the Bell address.

Q. Did Mr. Ragland tell you what the meeting was about? A. No, sir.

Q. Very well. Proceed.

A. He told me that I was to contact Mr. Waldron and have him there too at the same time, which I did. I contacted him in San Bernardino and had him come in and meet at this particular date with

(Testimony of Elmer Lysfjord.)

Mr. Ragland and whoever he was to bring with him.

Q. Very well. Then what happened?

A. Well, I did meet him there and at that time Mr. Waldron hadn't arrived, and we talked of general things, the weather and what have you, until such a time as Mr. Waldron arrived.

Q. Prior to the arrival of Mr. Waldron was anything said about your Los Angeles operation, Flintkote tile, or anything of the sort?

A. No, sir.

Q. Then Mr. Waldron arrived from San Bernardino? A. Yes. [398]

Q. Will you proceed from there?

A. Well, Mr. Thompson said that they were very sorry but from this time on they were unable to supply us with Flintkote tile.

Q. What did you say, if anything?

A. I was rather surprised. I couldn't understand why.

Q. Did you tell him that?

A. I asked him very definitely, why.

He said, "Well, you are not doing things according to the way we thought you were going to do them."

I said, "What are you referring to? What is that you want us to do or that we are not doing that you did want us to do?"

And then I believe Mr. Waldron mentioned, "I guess the pressure started to work a little bit more

(Testimony of Elmer Lysfjord.)

than you anticipated and that you are becoming worried about it.”

Then the conversation changed from Thompson talking to me to Mr. Thompson talking to Waldron, and I believe Mr. Waldron has already stated his part of that conversation.

Q. How long did this conference last?

A. Probably a half hour or something like that.

Q. Was anything else stated during this period, any other conversation with respect to your business or otherwise?

A. Well, Mr. Waldron again mentioned that he was quite [399] surprised that the question that we all anticipated was great enough that it would influence the Flintkote Company. And Mr. Baymiller admitted that there had been a considerable amount of pressure placed on them.

Mr. Black: That is objected to as calling for a conclusion of the witness.

The Court: The words beginning with “admitted” and all the rest of the answer from that word on is stricken.

You will have to bear in mind, Mr. Lysfjord, that you must tell us what was said and not your interpretation of what was said. That is, do not edit to the extent that you give us the conclusion or the opinion. You have to of course edit a little because you can't remember the exact words, but what we want here is the substance of a conversation and not your opinion of what the conversation admitted, concluded or argued.

(Testimony of Elmer Lysfjord.)

The Witness: I didn't mean it to be anything like that. What words have I used?

The Court: You said "He admitted," and then you went on to tell what he admitted. Now if you will tell us what he said the jury can decide whether he admitted or whether he did something else.

The Witness: Well, Mr. Baymiller stated that there was considerable pressure brought to bear.

Then Mr. Thompson interjected his opinion, or his [400] statement, I should say—I can't use the word "opinion," I guess—that it was completely out of their hands, and that would be Mr. Baymiller and Mr. Thompson, and that the higher-ups in their company had instructed them that Flintkote would no longer sell the aabeta company acoustical tile.

Q. (By Mr. Ackerson): Now at this meeting or since this meeting or otherwise, have you ever received anything in writing from The Flintkote Company in connection with their termination of your supplies? A. No, sir.

Q. Never one scratch of writing?

A. No, sir.

Q. No official notice of writing?

A. No, sir.

Q. No written notice requesting the meeting?

Mr. Black: That is objected to—pardon me.

The Court: Is it objected to or is it not?

Mr. Black: I will withdraw it.

Q. (By Mr. Ackerson): You received no written notice calling for the meeting? A. No, sir.

Q. Did you ever receive any written instructions,

(Testimony of Elmer Lysfjord.)

notice or otherwise pertaining to any objection Flintkote [401] ever had to your operations as aabeta company? A. No, sir.

Q. And that statement applies up to the present date, does it? A. Yes, sir.

Q. Now, Mr. Lysfjord, I am going to direct your attention to the time when you were with the Downer Company, that is, the R. W. Downer Company. I think you have stated you were a salesman for them? A. That is correct.

Q. Did you ever attend any meetings of the acoustical tile contractors as a representative of the Downer Company?

A. I attended several meetings but I can't say for sure that they were known as the acoustical tile contractors at that time.

Q. Were they attended by contractors, acoustical tile contractors? A. Yes, sir.

Q. When was the first meeting that you attended? Do you recall that?

A. I would say it was about 1950.

Q. Do you recall where it was?

A. In Burbank on, I believe the street name was, Hollywood Way.

Q. Do you recall the name of the building? [402]

A. It was a store building. There was no name to it.

Q. Do you recall any of the people who attended that meeting?

A. Yes, sir, very well. A Mr. William Arthur—

(Testimony of Elmer Lysfjord.)

Q. Who was Mr. William Arthur?

A. He was the sales manager for the Harold E. Shugart Company.

A. Mr. Dorman——

Q. Who was Mr. Dorman?

A. He was the estimator for Coast Insulating Company.

Q. Anyone else?

A. A Mr. Lewis A. Downer, a salesman for R. W. Downer Company.

Mr. Anthony Wellman, an estimator or perhaps at that time a salesman—he was first a salesman and then the house estimator—for the R. W. Downer Company.

Mr. Howard Smith, the estimator for Harold E. Shugart Company.

Q. Was that the same Mr. Howard Smith who was on the witness stand yesterday?

A. Yes, sir.

Q. Very well. Who else?

A. I believe a Mr. Smith from Sound Control Company.

Also a Mr. Hollenbeck who, for lack of a proper word, I would say the moderator, the man in charge, the—well [403] that is the best that I can put it.

Q. Now this was some time in 1950, you think?

A. Yes, sir.

Q. What happened when you arrived at this meeting? A. Well——

Mr. Black: Just one moment, please.

At this time we object to this line of testimony

(Testimony of Elmer Lysfjord.)

on the ground that no connection with the defendant Flintkote Company has been shown, in point of time it is too remote to have any connection with the events in this case, and for all the reasons that were urged in connection with the testimony with respect to the acts of alleged co-conspirators other than The Flintkote Company.

The Court: The objection is overruled, subject to a motion to strike.

Mr. Ackerson: Thank you.

Q. Will you relate what happened when you arrived at this meeting—first let me ask you, was Mr. Waldron there? A. No, sir. [404]

Q. What happened when you arrived at this meeting?

A. Well, we were all personal friends, salesmen in the field, had become acquainted from time to time or had met from time to time and become acquainted bidding against each other for these acoustical jobs.

Then Mr. Hollenbeck called the meeting to order and explained to us that——

Q. What did he say?

A. Well, we were gathered there for the expressed reason that the takeoffs that each of us had presented to him in the past were so inaccurate, in his estimation, he thought perhaps if we were all to be there at one time and discuss methods and manner of taking off or estimating acoustical jobs we probably could be more closely in line.

That it was rather difficult for him to figure out

(Testimony of Elmer Lysfjord.)

just what we were all talking about when we turned these estimates in to him.

Q. All right. Did anyone else say anything?

A. Well, they chose—I mean the group chose Mr. Smith to give a demonstration as to the proper method of taking off or evaluating the amount of acoustical tile that would go into a particular building.

They had a set of plans there they were going to use, that Mr. Smith was going to use to instruct us in this matter. [405]

Mr. Smith at that time presented each of us with a pad of identical takeoff sheets that we were to use to place this information in an orderly manner, that would be acceptable to Mr. Hollenbeck.

Q. Did Mr. Hollenbeck, was he connected with any particular acoustical tile company, to your knowledge? A. Not to my knowledge.

Q. All right. What did Mr. Smith do then? He presented these pads.

A. He proceeded to tell us exactly the manner he felt was proper in the approach of taking off acoustical job, tile job, and starting with the reading of the specifications and how it should be interpreted and placed on this particular sheet.

The measuring of the dimensions per room, the amount of rooms, the type of installation required, whether they were to be installed, or, rather, it was—the tile I am speaking of—was to be installed on 2 x 2 stripping, maybe 1 x 3 or perhaps cemented to an existing ceiling or a sheetrock backing, things

(Testimony of Elmer Lysfjord.)

like that that are very pertinent to the installation of acoustical tile.

Q. Did any of the audience have anything to say at this meeting?

A. There were general suggestions from most people. Mr. Hollenbeck asked me if I would like to offer some [406] particular manner that I thought was a good way to take off acoustical tile, and I refused to do so.

He asked me why I refused to do so.

And I told him that I didn't feel that I wanted to tell any competitors of mine the manner and the method I had learned through the years, as to getting acoustical tile off.

At that time Mr. Arthur interjected some of his conversation—he was a senior member, Mr. Arthur was a senior member at the time. In other words, he was the most responsible employee, shall I say, for all these firms.

Mr. Arthur said to me, "Weren't you instructed to do exactly what you were told at this meeting?"

I said, "Yes, I was told that, but that doesn't necessarily mean I am going to do that."

And he said, "Well, I am going to see that you do do it."

I said, "Well, that remains to be seen."

Q. Well, did you instruct them or tell them your method of taking it off?

A. No, sir, I did not. I had no intentions of imparting any of my knowledge to a competitor of mine, to hamper me in earning a living, because I

(Testimony of Elmer Lysfjord.)

was on commission. They weren't paying me one cent, other than what I earned myself.

Any job I was fortunate in getting and bringing in to the Downer Company, that we would be associated in doing, I got a commission for. [407]

If I were intelligent enough to be able to make money on the job I received my portion. If I were stupid enough to make a mistake and I lost money, or, rather, the company lost money, the group, shall I say—not group—the two of us lost money, I would have to contribute my share to the loss.

I didn't feel that I wanted to at any time help any one of my competitors to take some of my money out of my pocket, so to speak.

Q. So you did not make the speech?

A. No, sir.

Q. Did anyone else have anything to say at this meeting?

A. There was a great deal said. I don't know just exactly how to answer the question.

Q. How long did the meeting last?

A. Probably an hour.

Q. Did Mr. Hollenbeck have anything else to say?

A. I don't believe, so, at that time.

Q. Was that the only meeting you attended where Mr. Hollenbeck presided?

A. No, I attended one more in the general area of the first meeting. It was approximately the same operation as I have discussed with you in the past here.

(Testimony of Elmer Lysfjord.)

Q. Did you attend any other meeting? Is that the [408] only other meeting you attended where Mr. Hollenbeck was?

A. No, I attended one more at the Rodger Young Auditorium. It is a cafe, I believe, although the name is misleading.

Q. Tell us what occurred at this Rodger Young Auditorium meeting, will you?

A. It was a dinner, quite a large turnout. I believe there were two or three representatives from each of the acoustical contractors that were in business at that time.

Q. Whom did you represent, Downer Company?

A. Yes, sir.

Q. Mr. Waldron, was he at that meeting?

A. Yes, sir.

Q. Who represented the other companies? Just name as many as you can.

A. Howard Smith for Shugart Company. Mr. Tony Wellman for Howard Company. And Mr. Howard of the Howard Company.

Q. The same Mr. Howard that was here yesterday?

A. Yes, sir. Mr. Arnett of the Downer Company.

Q. Yourself and Mr. Waldron of the Downer Company, I take it? A. Yes, sir.

Q. Who else?

A. Mr. Jim Birchendall of the Shugart Company. A Mr. Jim Ballard of the Shugart Company. Mr. Smith of Sound [409] Control Company. A

(Testimony of Elmer Lysfjord.)

Mr. Nichols, I believe, if I recall the name correctly, from the L. D. Reeder Company.

Q. Were most of the acoustical tile contractors operating in this area represented by one or more people at that meeting?

A. They were all represented at that meeting.

Q. All of them? A. Yes, sir.

Q. Do you have an approximation of the date of this meeting? A. I believe it was 1951.

Q. Now, what transpired at this meeting?

Mr. Black: Of course, the court understands this is the same line of questioning to which we objected and for the same grounds.

The Court: The court makes the same ruling, which is a provisional ruling. The objection is overruled, but I will reconsider it on a motion to strike at the close of all the plaintiffs' evidence.

Mr. Ackerson: Yes.

Q. (By Mr. Ackerson): Will you proceed, Mr. Lysfjord?

A. Well, this was approximately following the same lines that the other meetings followed, in that, or, rather, Mr. Hollenbeck again tried to convince all of the salesmen that it was very important that we followed somewhat the [410] same lines, so that he could evaluate our takeoffs more definitely.

And Mr. Smith again gave an example of a take-off from a set of plans that were there at that time. And I believe that there wasn't too much attention paid to what Mr. Smith was saying. It became a— [411]

(Testimony of Elmer Lysfjord.)

Q. That is a little bit opinionated, I would say, Mr. Lysfjord. But if there is any reason you have, or anything that was done or said, Mr. Lysfjord, that might have led you to that opinion you can state what was done or said. I think the court will permit you to do that.

A. Well, the salesmen became a little upset with——

Q. What did they say, Mr. Lysfjord? The jury has to decide whether they became upset or not. You will have to state something that occurred.

A. Could I say what I said?

Q. Yes. A. Would that be what you want?

Q. Yes. What did you say or what did anyone else say?

A. I talked directly to a Mr. Howard Smith and a Mr. Jim Birchenall, stating that I did not approve of anything that was being done there because it was interfering with my livelihood. And Mr. Birchenall said, "Well, it is interfering with mine too, but we are instructed to do so, so why don't we try to go along?"

And Mr. Smith said, "You not only should try, you are going to have to go along."

Q. Mr. Smith of what company?

A. The Shugart Company— "—with this general practice of submitting our bids to a clearing-house," if I might use that word. [412]

Q. You mean Mr. Hollenbeck?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

The Court: Did anyone use that word besides you?

The Witness: Clearinghouse?

The Court: That term "clearinghouse"?

The Witness: I don't recall, sir.

Q. (By Mr. Ackerson): Then you meant Mr. Hollenbeck and not the clearinghouse? That was your own term?

A. Mr. Hollenbeck, yes, sir.

Q. What were you to do, as you understood it?

A. Well, we were—or speaking for myself—I was instructed by the Downer Company to take off a particular job on the standard take-off sheet in duplicate, one that I was to retain, the other that I was, through one of the secretaries, send to Mr. Hollenbeck's address for a comparison of take-offs.

Q. Comparison with what take-offs?

A. Of other contractors who were to do the same.

Q. Did you do that? A. I did that.

Q. If you know, what did Mr. Hollenbeck do with these take-offs when he got them?

A. I know very well because it cost me a little money the first time I found out. [413]

I resented this take-off being sent in to the company, and I proceeded to bid the job which I would do ordinarily, and I was chastised by both Mr.—

Q. Wait a minute, Mr. Lysfjord. You can't state what happened. These words "chastise," and so forth, of course they may mean one thing to you and they may mean something else to the court, to the jury or to me. Just state if you can what

(Testimony of Elmer Lysfjord.)

happened. Now we were at the point where what did Mr. Hollenbeck do with these take-off sheets when he got them, if you know.

A. Well, I was trying to lead up to that as to how I knew what he did with them.

Q. Very well. Proceed, then. Just state the facts as best you can. I know this is a little difficult.

A. As I said, I bid the job with full intentions of getting the job for myself, which I did, and I did get the job. And Mr. Arnett and Mr. Downer, R. W. Sr.—he is dead now, but at the time he was alive—called me into their office and said, “We can’t have any more of this.”

I said, “I thought I was here to sell jobs.”

They said, “Well, you are here to do what we tell you to.”

And I said, “Well, I don’t understand. What have I done wrong here?”

And he said, “Don’t you realize that you had the low bid in there and you weren’t supposed to bid.” [414]

I said, “No, I have no idea that I wasn’t supposed to bid. I thought the idea was to be the low bidder.”

And he said, “Well, not with this arrangement we have for checking bids. They take the lowest bid of all the contracting bids that have been presented to Mr. Hollenbeck and he is not allowed to bid,” and he said, “We were low bid and you are not allowed to bid,” which made me very unhappy because that again cost me money.

Q. Well, now, did you ever have any conversa-

(Testimony of Elmer Lysfjord.)

tions with Mr. Arnett concerning this bidding matter? A. Quite a few.

Q. Will you state when and where and what the circumstances were?

A. In the year of 1950 and into 1951. They followed this general pattern, and I refused to go along with it in that the Downer Company was not paying me any salary, and the only way I could earn any money was to sell a job. And I would just take any job that I could find and try to sell it, and time and time again they would tell me, Mr. Arnett and Mr. R. W. Downer, that I would have to follow a pattern that they set up, that certain jobs were not to be bid by us, that they were being given to somebody else to bid.

Q. Did Mr. Arnett tell you that on any occasion?

A. Yes, sir.

Q. Can you think of any particular occasion or did it [415] happen frequently?

A. Frequently. As a matter of fact, Mr. R. W. Downer called me into his office one time and he said, "You must be Peck's bad boy."

I said, "Why do you say that?"

He said, "Well, you are doing everything contrary to what we tell you to do."

I said, "Well, if you want to give me \$1,000 a month salary I will do anything you want me to do, but until such a time as you may pay me a salary then I will sell jobs whenever I find them and whenever I can."

He said, "Well, I think perhaps maybe we can't be associated any further."

(Testimony of Elmer Lysfjord.)

And I said, "That is your privilege. It is your company."

Q. Did he ever take any action along that line?

A. No, sir.

Q. Now, on how many occasions would you say that you had disagreements along that line with Mr.

Arnett? A. With either one?

Q. Either R. W. Downer or Mr. Arnett.

A. Probably a dozen times.

Q. Who is Mr. Arnett again? What position does he occupy?

A. Well, he is the general sales manager and general [416] manager of the firm. I believe also that he is a vice president. The firm I am referring to is the R. W. Downer Company.

Q. Now, Mr. Lysfjord, during your experience as a salesman did you have any personal knowledge as to the manufacturer's list prices for one-half inch 12 x 12 acoustical AMA approved tile?

A. Yes, sir. [417]

Q. Do you have any knowledge whether your competitors and the Downer Company paid the same or different prices for that tile from the manufacturer?

A. Well, at one time I had in my possession the price list of the Simpson acoustical tile at the time I worked for Coast Insulating Company. I had a price list in my possession at the R. W. Downer Company, which handled Armstrong acoustical tile. I had in my own company the price list of The Flintkote Company.

(Testimony of Elmer Lysfjord.)

Q. Were there any differences in the prices?

A. In the large sizes there might be as much as a quarter of a cent difference. The basic tile, 1/2-inch 12 x 12 was identical.

Q. What was the price you had, these prices?

A. Ten cents a square foot.

Q. That is true with each company?

A. Yes.

Q. That is the price that you, as an acoustical tile contractor, could buy it if you had a factory connection? A. Yes, sir.

Q. Mr. Lysfjord, I am going to show you Plaintiffs' Exhibit 19 in evidence. Here is the first sheet, the first set of documents. I am also handing you Plaintiffs' Exhibit 29 for identification, which comprises the documents in this folder. [418]

In other words, Exhibit 19 is the first set of documents I have shown you. The second set in the folders here are for identification, and are Exhibit 29 for identification.

Now, Mr. Lysfjord, I ask you to look in the documents for identification and see if you can find the Howard bid for the John A. Sutter Elementary School. Can you do that without these documents?

Let's try the next one. I believe that one is missing, Mr. Lysfjord.

Let's take the addition to the Thompson School, Bellflower. Do you find that? A. Yes, sir.

Q. What does that record show, if you can tell, that the Howard Company bid on that job?

Mr. Black: The Court please, that is objected

(Testimony of Elmer Lysfjord.)

to for the same reasons we have been urging, namely, no connection shown with Defendant Flintkote Company.

And also I would like to make this request—and I believe Mr. Ackerson has no objection to it—in connection with all of these documents that were offered for identification yesterday, we attempted to examine them this morning, never having seen them at all, and we found Mr. Ackerson had them last night and had them all this morning at his office. We haven't seen them. We don't know what is in those files. [419]

They were simply produced in response to a subpoena. We, without prejudice to our objection, would like the privilege of reserving cross-examination on these documents, until we have had an opportunity of examining these voluminous files and seeing what they are.

The Court: Surely.

Mr. Ackerson: No objection to that.

The Court: You took them away last night, Mr. Ackerson. You might not object to Mr. Black taking them away tonight.

Mr. Ackerson: I think he should, your Honor. I had to have them for today's examination or I wouldn't have presumed upon the court.

The Court: Then he can examine them while we are engaged in our other case tomorrow morning and perhaps be ready to proceed in the afternoon.

Mr. Ackerson: Yes, your Honor.

Q. (By Mr. Ackerson): Do you find the bid for

(Testimony of Elmer Lysfjord.)

the addition to the Thompson School in Bellflower in that folder, Mr. Lysfjord? A. Yes, sir.

Q. What is the bid price of the Howard Company? A. \$3,922.00.

Q. Is that broken down in any way?

Mr. Black: For the record, I am sorry to interrupt, but we must also interpose the further objection that there [420] is no foundation laid for these documents or questions.

The Court: Sustained on that ground.

Mr. Black: We just don't know. It is something that came out of somebody's files.

Mr. Ackerson: They were identified, I believe, yesterday as the documents for the specific jobs named in the duces tecum. The duces tecum specified the jobs exactly.

Mr. Black: Well, we still don't know what the documents are.

Mr. Ackerson: Very well. I misunderstood you.

Q. (By Mr. Ackerson): Mr. Lysfjord, referring to this folder on the addition to the Thompson School, can you identify, can you tell us what type of documents are in that folder?

A. Well, the document I am reading from now is a contract between Albert Reingard, general contractor, and the R. E. Howard Company, acoustical tile contractors, for the performance of installation of acoustical tile on the Bellflower school—the Thompson School of Bellflower; I am sorry.

Q. Are there any other documents in the file that you can explain to us?

(Testimony of Elmer Lysfjord.)

A. Here is a takeoff file showing exactly the amounts of material in the specific areas they are required. The types of material, the method of installation required—— [421]

Q. In other words, it is a regular takeoff sheet for the job, is it, identified as this Thompson deal, on its face? A. It doesn't seem to be——

Q. This contract, the quoted price on the contract itself was \$3,922.00, is that right?

A. Yes, sir.

Mr. Ackerson: Mr. Black, I have these people under individual subpoenas. If further identification of these individual documents is necessary, I am wondering if we might stipulate that I might use them today in this examination, subject to a correction, identification, or whatever you want to do in the future about it.

I would like to offer them today, if I may, subject to your examination and motion to strike or whatever you wish tomorrow.

Is there any way we can work that out? In other words, I am merely taking—I merely wish to take the date off the files presented yesterday under subpoena and compare them to the date on this exhibit already in evidence.

The Court: Counsel, since you have something to work out here, I don't want you to have to do it under pressure by having the jury here. We will take our afternoon recess while you try to work out a stipulation, if you can.

(Short recess taken.) [422]

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: Your Honor please, Mr. Black and I have conferred about this during the recess. It is not the desire of either party to limit any objections or any rights of the other party, but for convenience and in the interest of time consumption we have agreed that these documents may be received in evidence, subject to the present motion of Mr. Black running throughout this type of testimony, and subject to any rights Mr. Black may have to object to the documents otherwise by motion to strike or otherwise, after he has had a chance to examine them. In other words, reserving full rights of Mr. Black to renew or add to objections after he has had a chance to examine them over the evening.

Mr. Black: That is our understanding.

Mr. Ackerson: Then I will offer this Exhibit 29 for identification in evidence.

The Court: 29 is received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 29.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, let's go to this first folder there relating to the addition to the Thompson School in Bellflower, and I will call your attention to the fact that on the Plaintiffs' Exhibit 19 in evidence the Downer documents indicate a bid—indicates first that the job went to H. O., is that your prior testimony, or is that your testimony? [423] Does that indicate that to you? A. It does now, yes, sir.

(Testimony of Elmer Lysfjord.)

Mr. Black: I prefer, Mr. Ackerson, that the witness be asked what it indicates rather than the other way around. I wish to shorten time, but let him do the testifying.

Mr. Ackerson: Very well, Mr. Black.

Q. What do the initials "H. O." at the top of that corner of that document of the Downer Company, Exhibit 19, indicate, Mr. Lysfjord, if you know?

A. It indicates to me that the R. E. Howard Company was to get this job.

Q. Now what does the document show with respect to—well, let me place this.

The document is in evidence, Mr. Black. It shows a figure of 3455 and a figure under it of 467. (Writing on blackboard.)

Now will you refer to the document you have there in front of you from the Howard Company and can you determine from that what the Howard Company bid on that job? A. \$3,922.

Q. \$3,922? A. Yes.

Q. Now let's go to the next document, which is the Muir Jr. High School Building, Burbank, California.

I again call your attention to the initials in the upper [424] left-hand corner of the Downer document, Exhibit 19. Does that indicate that the Howard Company got that job? A. Yes, sir.

Q. And here is a sheet of paper, Mr. Lysfjord, attached to the Downer document. Can you identify the writing or otherwise on that sheet of paper?

(Testimony of Elmer Lysfjord.)

A. Yes, sir, that is Mr. Arnett's. And, incidentally, on the top of this sheet its says "REH."

Q. Which means what?

A. To me it means R. E. Howard Company.

Q. Now on that sheet of paper we have the figure \$39,872. Can you tell me what the Howard document indicates was bid on that Muir job?

A. \$39,872.

Q. Now let's turn to the next document. That relates to some portion of a transit shed, Long Beach Harbor, Long Beach, California. Do you have that in the Howard document?

A. Yes. [425]

Q. You have located the document?

A. Yes.

Q. In the upper right-hand corner you again have the initials "H.O." Does that likewise indicate it was a Howard job? A. Yes, sir.

Q. The Downer document indicates a bid by the base bid of \$1,205.00?

Mr. Black: Please let the witness say what it indicates.

Mr. Ackerson: Yes.

Q. (By Mr. Ackerson): Do you see on the Downer document the pencil figure there?

A. \$1,205.00.

Q. \$1,205.00. Does that indicate that, to you, that that was the Howard bid?

The Court: Let's get it in the words of the witness.

Mr. Ackerson: Yes.

The Court: What we are trying to do is to avoid leading questions to the extent that the witness has

(Testimony of Elmer Lysfjord.)

only to yes the attorney. We ought to get the story in the words of the witness.

Mr. Ackerson: Thank you, your Honor.

Q. (By Mr. Ackerson): What does this penciled writing indicate to you, Mr. Lysfjord (indicating)?

A. That was the figure that the R. E. Howard Company [426] was going to bid on this job.

Q. That figure is what?

A. \$1,205.00. There is a second figure for an additional amount of work for \$17,477.00.

Q. Now, you have the red figures in the circle there on that paper. Do you observe that?

A. Yes, sir.

Q. What do they state, and what is their significance?

A. They state that the figure of \$1,205.00 was to be raised 7 per cent, and, incidentally, the 7 per cent is here, too (indicating).

Q. It states 7 per cent? A. Increase, yes.

Q. What is the red figure for the Downer Company? A. \$1,289.00.

Q. Turning to the Howard document on the same job, what do you find there as the bid of the Howard Company? A. The initial bid of \$1,205.00.

Q. \$1,205.00. Is there another bid there?

A. The additional bid of \$1,400.00.

Q. \$1,400.00. Is there any indication on the Downer bid what they bid on the secondary bid?

A. The secondary bid was \$1,477.00, increased by 7 per cent, to \$1,580.00.

(Testimony of Elmer Lysfjord.)

Q. We will label this "Downer; Downer; Howard." indicating [427] the first column as the Downer notations of the Howard bid.

The second column is the bid as shown by the Howard files, and the third column is the bid submitted by the Downer Company.

A. Yes, that is correct.

Q. All right. Now, let's go back to these first two, and will you give me the statement for the—the same information with respect to the notations on the addition to the Thompson School, as shown on the Downer document? What was the Downer bid there? A. \$3,731.00.

Q. Is there any other notation?

A. And \$504.00.

Q. Any reference to a percentage or anything of that sort?

A. No, sir, not on this one.

Q. Let's take the next one relating to the John Muir School. Will you give me the same information with respect to the Downer bid on that job? Is there any indication there as to what the Downer Company did?

A. I am trying to decipher it. It is up here at the top. I can't separate these?

Q. No, you can't.

A. It is forty-four thousand one [428] something.

Q. Forty-four thousand plus?

A. Plus, yes.

Q. Very well. Now, let's take the——

(Testimony of Elmer Lysfjord.)

A. Here is the code figure that is crossed out and moved up to the forty-four thousand.

Q. Indicating what?

A. The \$39,872.00 that was mentioned before as being the Howard figure.

Q. That is in the first column?

A. That is right, in Mr. Arnett's handwriting and crossed out and a figure above it raising our figure, the Downer Company figure, to forty-four thousand plus. [429]

Q. This is in the third column, is that right?

A. Yes.

Q. Very well.

Now we are to the third portion of the transit shed, and I believe you testified—will you state and explain the writings on the back of the Downer document?

A. Well, this figure \$1,205, the Howard Company's figure, raised seven per cent to \$1,289.

Q. Is that the Downer bid? A. Yes, sir.

Q. And is that reflected on the front of the sheet also as the Downer bid?

A. Yes, sir. It says, "We propose to furnish and install Fibreboard walls and aluminum molding as per plans and specifications complete for the sum of \$1,289."

Q. That is the third figure here then?

A. Yes, sir.

Q. Is the same thing indicated with respect to the second figure on that sheet, or is there a second figure?

(Testimony of Elmer Lysfjord.)

A. There is a second figure. It says, "If acoustical tile is used in lieu of acoustical plans our bid is \$1,580."

Q. That is the third column again?

A. Yes, sir.

Q. Very well.

Now, let's try the next sheet here, which is the gymnasium [430] building, plans on file, Manhattan Beach. Do you find the file in the Howard documents relating to that job? A. What was that?

Q. The gymnasium building, plans on file, Manhattan Beach, Milton Kaufman Construction Company, Arthur Penner. A. I don't see it here.

Q. You do not find it in the Howard Documents?

A. No, sir.

Q. Very well. Let us pass on to the next sheet.

The Downer documents indicate intermediate school addition, Culver City. Do you have such a sheet? A. Yes, sir.

Q. Do you find the Howard file on that?

A. Yes, sir.

Q. I call your attention to the Downer file, which is still Exhibit 19, and ask you whether or not you see anything on that exhibit indicating that that was a Howard job?

A. Two things. In the upper right-hand corner it says "HO," or it is written "HO," indicating Howard, and directly below it is the word "Howard" written in full.

Q. Now I call your attention to the back of the

(Testimony of Elmer Lysfjord.)

same document you just referred to, and ask you what the significance of the writing you find on the back that document might be.

A. There is a figure \$2,190 indicating Howard's figure. [431]

Q. \$2,190? A. Yes, sir.

Q. Very well.

A. And a figure to be quoted by the Downer Company of \$2,278.

Q. \$2,278? A. That is correct.

Q. Now refer to the Howard documents, that is, Exhibit 29, I believe, and I will ask you if there is anything in there to show what the Howard Company actually did?

A. There is a contract in here between the Simpson Construction Company and the R. E. Howard Company to do the job just mentioned for the sum of \$2,190.

Q. Very well.

Now, let's turn to the next sheet, and in the Downer documents, Exhibit 19, it refers to South Bay Cities Courts Building, Redondo Beach. Do you find a document relating to that job in the Howard file? A. Yes.

Q. Now I call your attention to Exhibit 19. Is there anything on the Downer document indicating who performed that job?

A. The upper right-hand corner it is written "How," which to me indicates the Howard Company, and slightly below is the word spelled out, "Howard." [432]

(Testimony of Elmer Lysfjord.)

Q. On the reverse of the sheet do you find certain figures?

A. The figure \$889, which is an indication to me of the figure that the R. E. Howard Company was going to bid on this job.

Q. What is the figure again? A. \$889.

Q. What, if anything, indicates the Downer bid on that sheet?

A. In red stating, "Quote \$978," as the Downer Company bid.

Q. \$978? A. That is correct.

Q. Now turn to the Howard file, Exhibit 29. Is there anything there indicating what the Howard Company actually did?

A. Yes, here is a contract between the contractor and the R. E. Howard Company to do the acoustical tile on the job described for \$889. [433]

Q. Now, we have the next job here involving acoustical tile, Stevens Junior High School. Do you have such a folder there for the Howard Company, Exhibit 29, which refers to that job?

A. Yes, sir.

Q. Now, I call your attention again to Exhibit 19, referring to the same job. Do you find any indication there that Howard performed that job on the Downer records?

A. In the upper right-hand corner again is the initials "H.O.," indicating to me Howard Company.

Q. On the reverse of that sheet you just referred to, do you find any other figures or any figures?

(Testimony of Elmer Lysfjord.)

A. I see a figure here of \$1,584.00; the figure that is to be used by the Howard Company.

Q. That is contained on the Downer records?

A. That is correct. And another figure of \$448.00.

Q. \$448.00. Is there anything indicated on the Downer records as to what Downer did?

A. Downer quoted for the first figure \$1,675.00. For the second figure \$675.00.

Q. Now, turn to the Howard documents and see if there is anything that indicates what Howard actually bid.

A. Well, there is a contract for a total amount of work for \$2,194.00.

Q. Now, we have another job here in Exhibit 19, multi-purpose [434] building, Longfellow School, Compton. Do you find the document in the Howard file, Exhibit 29, relating to that job?

A. Is that the Longfellow School you mentioned?

Q. Yes, Longfellow School, Compton.

A. Yes, sir.

Q. All right. I call your attention to Exhibit 19 again and to a sheet of that exhibit relating to the Longfellow School. Is there any indication on that sheet, to your knowledge, Mr. Lysfjord, indicating who got that job?

A. Well, in the upper right-hand corner of this sheet of the Downer Company once again it has a number 3 circled. At a later date from the time we have been discussing they changed from using the initial to a number, referring to one or other of the accoustical tile contractors.

(Testimony of Elmer Lysfjord.)

Q. Is there anything on that sheet indicating that that was a Howard job?

A. Written right across the front of the sheet it says, "R. E. Howard."

Q. Turn that sheet over, Mr. Lysfjord, and see if there is any indication there on the Downer record as to what the Howard Company was bidding.

A. The initial figure of \$1,878.00.

Q. \$1,878.00.

A. That is correct. Another figure of [435] \$870.00.

Q. Is there any indication there as to what the Downer Company bid?

A. Yes, sir, it has \$1,975.00.

Q. \$1,975.00? A. Yes. And \$916.00.

Q. Now, turn to the Howard document on that job and tell me, if you can, what the Howard Company bid for that job?

A. There is a contract price between the James M. Dye, Incorporated, and the R. E. Howard Company for the acoustical work for the sum of \$1,878.00.

Q. Any other figure on that document? Is there any figure corresponding to the \$870.00 on the Downer document?

A. Well, there is another sheet here with a confirmation. In other words, a written acknowledgment of a verbal bid for the additional amount of \$870.00.

Q. Well, let's try the next document here. What was that last job, Mr. Lysfjord?

(Testimony of Elmer Lysfjord.)

A. Longfellow School, multi-purpose building.

Q. Do you have any additional files there from the Howard files relating to other jobs, Mr. Lysfjord?

A. I have one here for the teachers' lounge, Culver City High School.

Q. Will you see if you can find a document in the Downer files relating to that job? [436]

A. Yes, sir.

Mr. Doty: Are you referring to Plaintiffs' 20?

Mr. Ackerson: I am referring to Plaintiffs' 19.

Mr. Doty: I don't mean to interrupt. You seemed to be having trouble finding the file. Plaintiffs' Exhibits 19 and 20, you put in and said they referred to Howard at the time.

Mr. Ackerson: Thank you, Mr. Doty, but I am referring to 19 now.

Q. (By Mr. Ackerson): Is there anything on the Downer record, Exhibit 19, indicating whether or not there was a Howard job?

A. Yes, sir, up in the right-hand corner once again there is an "H.O." to me signifying the Howard Company, and directly below it is "Howard" written in full.

Q. On the reverse of that sheet, Mr. Lysfjord, do you find any figures indicating what the Howard bid was on the Downer documents, as contained on the Downer documents? A. \$344.00.

Q. Is there anything on that Downer document, Exhibit 19, relating to this particular school, that states what the Downer bid was?

(Testimony of Elmer Lysfjord.)

A. Downer bid of \$358.00. [437]

Q. Now will you turn to the Howard records, Exhibit 29, and see what the Howard Company actually did if the record shows that?

A. \$438.

Q. \$438?

A. Oh, there is an additional sum there. They did an extra amount of work. The original sum was \$344 and an added sum of money for an extra of \$94, making it \$438.

Q. The original bid was \$344 or \$444?

A. \$344.

Q. Now are there any other records in the Howard file, Exhibit 29, relating to other jobs? Do you have one for the Sutter Junior High School, Los Angeles Board of Education, etc.?

A. Yes, sir.

Q. Now, I refer your attention again to Exhibit 19. Do you find a sheet there relating to the same job, the Sutter school? A. Yes, sir.

Q. And is there anything on that Exhibit 19, the Downer record, which would indicate what the Howard Company bid?

A. In the upper right-hand corner the initial "H" indicating to me Howard.

Q. And on the reverse side of the sheet which you just referred to, is there any indication what the Howard [438] Company bid on that job?

A. \$417 and \$147.

Q. And is there any indication what the Downer Company bid on the same job?

(Testimony of Elmer Lysfjord.)

A. \$458 and a figure of \$165.

Q. Now turn to the Howard folder, Exhibit 29, and see if you can tell us what the Howard Company actually bid?

A. There is a confirmation by the Howard Company to the Hudson Construction Company for the Sutter Junior High School for a total of \$564.

Q. Now does that complete the folder you have for the Howard Company? A. Yes, sir.

Mr. Ackerson: I will offer Plaintiffs' Exhibit for Identification—I believe it is 20; I don't see the marking on there—Plaintiffs' Exhibit 20 for Identification in evidence.

The Court: Received.

The Clerk: I can't tell what it is. No. 20 is an estimate sheet.

Mr. Ackerson: These are additional documents to the previous exhibit.

Mr. Doty: Then they are still part of Plaintiffs' Exhibit 29, I take it?

Mr. Ackerson: Yes, we will make them part of Exhibit [439] 29.

Q. I show you some additional documents of the Howard Company, Mr. Lysfjord, and I ask you if you find a folder there relating to the Carver School addition, Willowbrook? A. Yes, sir.

Q. And I show you Plaintiffs' Exhibit 20 and ask you if you find a document there relating to the same job? A. Yes, sir.

Q. Exhibit 20 you recognize as the Downer records? A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. Is there anything on the Downer records, Exhibit 20, that indicates who got that job?

A. There is an "HO" on the upper right-hand corner, indicating the Howard Company.

Q. And on the reverse side of the sheet are there any figures, on the Downer records, what the Howard Company bid?

A. Yes, sir. The first figure of \$4,233, \$809, and \$1,995.

Q. And does that document, Plaintiffs' Exhibit 20, indicate what the Downer Company bid?

A. Yes, sir. \$4,529, \$866 and \$2,135.

Q. Now if you can, turn to the Howard Company documents and see if you can determine what the Howard Company actually bid?

A. The first figure of \$4,233, the second figure of [440] \$809, and the third figure of \$1,995.

Q. Now do you have a Howard folder there relating to the kindergarten addition, Savannah School, Rosemead? A. Yes, sir.

Q. I again call your attention to Plaintiffs' Exhibit 20 and ask you if the Downer documents contain a record or a reference to that school job?

A. Yes, sir.

Q. And does the Downer document indicate who got the job?

A. In the upper right-hand corner are the initials "HO."

Q. Which indicates the same Howard Company? A. Yes.

Q. Now, on the reverse side of this Savannah

(Testimony of Elmer Lysfjord.)

School, do you find any indication on the Downer records what the Howard Company was bidding?

A. Yes, sir, the sum of \$434. [441]

Q. Has the same document, Exhibit 20 of the Downer Company, or, does it indicate what the Downer Company bid?

A. Downer Company bid \$481.00.

Q. Now, turn to the Howard documents and tell me, if you can, what the Howard Company actually bid?

A. The Howard Company actually bid \$434.00.

Q. Now, we have one other job here, the City Hall Bell, City Council Bell—City Hall Bell, I think, is the title of the job.

Do you have a folder covering that job from the Howard files? A. No, sir.

Q. Do you have a folder covering the Five-Shop Building, Compton, in the Howard files?

A. No. I have one here saying "Compton Junior High." There might be—

Q. This is Compton Junior High? See if you have one for Five-Shop Building, Compton Junior College, Compton, the contractor being W. C. Smith, I believe, or Morley Building Company.

A. This is with the Morely Building Company. I may find further papers here to state that it is the—

Q. Did you have a paper there, Mr. Lysfjord, that would indicate the amount that Howard bid on the job you are referring to? [442]

(Testimony of Elmer Lysfjord.)

A. Yes, sir.

Q. What did they bid? A. \$4,652.00.

Q. Now, I call your attention to, I think this is part of Exhibit 20. It is the remaining sheets.

Mr. Ackerson: Mr. Black, do you have any objection to stapling it on Exhibit 20, rather than making it a separate exhibit?

Mr. Black: None whatever.

Q. (By Mr. Ackerson): The last page then, Mr. Lysfjord, of Plaintiffs' Exhibit 20, the Downer document I am handing you, is there anything on that page that indicates who got that job?

A. In the upper right-hand corner of this paper there is spelled out the word "Howard."

Q. Will you reverse the page that you are just looking at and tell me what you see on the reverse side of the page, with respect to bidding figures?

A. It has the "R. E. Howard" figure of \$4,652.00.

Q. \$4,652.00. And what, if anything, does the paper show with respect to the Downer bid?

A. There is a note stating, "Add 4 per cent, \$4,838.00."

Q. Now, turn to the Howard documents and tell me, if you can, what the Howard Company did, in fact, bid.

A. The contract calls for a figure of \$4,652.00. [443]

Mr. Ackerson: Mr. Clerk, it has been stipulated this may be deemed part of 29 (indicating).

You may staple this last page on Exhibit 20.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, these are the same documents with respect to the Shugart Company and the same stipulation—

Mr. Ackerson: Is that correct, Mr. Black?

Mr. Black: Yes; same reservation.

Mr. Ackerson: Same reservation. This is Exhibit 33 for Identification. We offer it in evidence under the reservation and stipulation mentioned in connection with the prior exhibit.

(The document heretofore marked Plaintiffs' Exhibit 33 was received in evidence.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, I have handed you Plaintiffs' Exhibit 33 consisting of certain documents. Will you tell us what those documents purport to be?

A. The job files of certain acoustical installations of The Harold E. Shugart Company.

Q. Now, do you have a record there relating to the Puente High School addition, Puente?

A. Yes, sir.

Q. I call your attention to Plaintiffs' Exhibit 21, consisting of the Downer records. Do you find a job, the same job mentioned on Plaintiffs' Exhibit 21? [444]

A. Yes, sir.

Q. Is there anything on the Downer records, that is, Exhibit 21, which indicates what company performed that job?

A. In the upper right-hand corner are the initials "SH," indicating to me Shugart Company.

Q. Now, turn the page on that particular sheet

(Testimony of Elmer Lysfjord.)

you are referring to. Is there anything else on the reverse side of the document which would indicate what the Howard Company bid on that job?

Mr. Black: Shugart Company?

Mr. Ackerson: The Shugart Company. Beg your pardon. Thank you.

The Witness: Yes, sir, a figure of \$4,822.00.[445]

Q. (By Mr. Ackerson): \$4,822?

A. And another figure as a second bid for additional work of \$6,303.

Q. Is there anything on that document there, Exhibit 22, indicating what the Downer Company did?

A. Yes, there is a note to increase the Shugart figure by 7 per cent, making the figure \$5,160.

Q. \$5,160?

A. And an additional note of increasing the second figure by 7 per cent, making the figure \$6,741.

Q. Now turn to the Howard documents——

Mr. Black: Shugart.

Q. (By Mr. Ackerson): ——the Shugart document—excuse me—relating to the same job, and tell me if you can what the Shugart Company actually did on the job?

A. There is a contract price for \$6,303.

Q. Is there any mention about the other figure of \$4,822?

A. Yes, there is a confirmation sent to the general contractor for the bid No. 1 of \$4,822.

Q. See if you can find a folder in the Shugart

(Testimony of Elmer Lysfjord.)

file, Mr. Lysfjord, relating to the addition to the Roosevelt School, Bellflower.

A. I don't seem to. [446]

Q. Well, that is not——

A. Oh, yes. I beg your pardon. I found it.

Q. Now I call your attention to Plaintiffs' Exhibit 21, and ask you if you find the same job mentioned on that document? A. Yes, sir.

Q. Is there any notation on the Downer document, Exhibit 1, as to who got that job?

A. In the upper right-hand corner the indication Shugart by the three initials, or the three letters, "Shu."

Q. Turn the page over and tell me, if you can, from the document what, if any, figures are shown there indicating the bid of the Shugart Company on the Downer document?

A. A figure of \$4,172, and an additional figure of \$447, and another figure of \$1,284.

Q. Is there any indication as to what the Downer Company bid on the same job?

A. Yes, sir, a figure of \$4,487, a figure of \$489, a figure of \$1,161.

Incidentally, I might add that that third figure is under the classification of a deduct.

Q. What does that mean? Does it so state on the document? A. Yes, sir, it says "Deduct."

Q. What does that mean, if you know, Mr. Lysfjord? [447]

A. Well, in bidding a job the specifications and plans will call for a certain piece of work to be

(Testimony of Elmer Lysfjord.)

completed. They sometimes ask in addition to that, if a building or a series of classrooms or a portion of a building were to not to be built at this time, they ask for an amount of money to be deducted from the original bid if the principals or owners decided not to do this work at that time.

Q. So that on the Downer bid this \$1,161—is that a deduct?

A. Yes, sir, that is a deduct from the figures above.

Q. In the event a portion of the building was not built? A. That is correct.

Q. Is there any special significance to the \$1,284 figure relating to the Shugart bid?

A. Well, to me it indicates that the deduct is less on the Downer figure than it is on the Shugart figure.

Q. Is this \$1,284 figure on the Downer document relating to the Shugart bid also a deduct?

A. Yes, sir.

Q. In other words, that is the same figure as the \$1,161, I mean the same type of figure?

A. They are both indicated as deducts.

Q. I am going to put a star here to indicate deducts.

Now, turn to the Howard documents, if you will, relating to that same job and will you tell me, if you can, what Howard [448] actually bid on the job?

Mr. Doty: Shugart.

Mr. Ackerson: Shugart. I am sorry.

(Testimony of Elmer Lysfjord.)

The Witness: The original figure of \$4,172, the second figure of \$47, and a deduct of \$1,284.

Q. (By Mr. Ackerson): Now that was the Daniel Webster School, was it? Do you have a folder for the Daniel Webster School in the Shugart file? It is new school plant, Daniel Webster School, Long Beach?

A. I don't seem to see that one.

Q. How about the Lakeside School, Santa Fe Springs? A. No, sir.

Q. On Plaintiffs' Exhibit 21 I note that on the Lakeside School, Santa Fe Springs, there are some notations. Can you from those notations tell who that job went to?

A. Well, I see the initials, or the letters "Sh" crossed out and the initial "S" placed in there. To me that indicates the Sound Control Company. [449]

Q. Sound Control got the job?

A. Yes, sir.

Q. Now, let's see about this remaining job here. Flora Drive School, Whittier. Do you have that?

A. I don't seem to have that one here, no, sir.

Q. I show you Plaintiffs' Exhibit 21 again and ask you if you can tell me from that, from the Downer documents, who purportedly got that job?

A. The initials "S.H." in the upper right-hand corner, a circle around the initial "D," and an "O.K." written before it.

Q. What does that indicate? What does it mean?

A. It indicates there was some change in their plans at the very last moment and Shugart was not

(Testimony of Elmer Lysfjord.)

to get the job, but that the Downer Company was.

Q. And you find no records in the Shugart files submitted yesterday indicating that the Shugart Company actually got the job? A. No, sir.

Q. Now, will you see if you have a folder for the Hawthorne School, Beverly Hills? A. No, sir.

Q. Do you have a folder in the Shugart file for the Academy Building, San Fernando?

A. No, sir. [450]

Q. Do you have a folder for the Franklin School building, Burbank? A. Yes, sir.

Q. Do you find a Downer record relating to the same job in Plaintiffs' Exhibit 24, which I show you? A. Yes, sir.

Q. Does the Downer record indicate who got the job?

A. This time there are no initials in the upper right-hand corner. However, the name "Shugart" is spelled out.

Q. Is there any place in that record, Plaintiffs' Exhibit 24, the Downer records, indicating what the Shugart Company did on the job?

A. On the reverse side the figure of \$1,763.00.

Q. Does the same record indicate what the Downer Company bid?

A. Yes, sir, \$1,940.00.

Q. Any other notations with respect to the Downer bid?

A. Only that it is signed by "R.W.A."

Q. Meaning whom? A. Mr. Arnett.

Q. See if you can determine what the Shugart

(Testimony of Elmer Lysfjord.)

Company bid actually on that job from the Shugart records?

A. The contract price of \$1,763.00.

Q. Do you have a folder there referring to a job known [451] as Addition to Gymnasium and Cafeteria, Mira Costa High School? I am referring to the Shugart file.

A. No, sir.

Q. Do you have one referring to the Corona Avenue School assembly hall?

A. Yes, sir.

Q. Do you find a similar document in Plaintiffs' Exhibit 24 here, the Downer record, referring to the same job?

A. Yes, sir.

Q. Does the Downer record disclose who was to get the job?

A. The upper right-hand corner, the lettering "S-h-u-g" indicating to me Shugart Company.

Q. What, if anything, does the Downer records say regarding the Shugart bid?

A. \$912.00.

Q. What did the Downer Company bid?

A. \$984.00.

Q. Now, can you tell me what was actually bid by the Shugart Company from their own files, from the Shugart file?

A. \$797.00.

Q. Any additions, or is that the total bid?

A. Well, I was looking at a billing at that particular [452] time.

Q. That apparently is the bid, so far as you can determine?

A. That seems to be, from what I can see.

Mr. Ackerson: Very well. Now, I am going to attempt to shorten this by referring to isolated ex-

(Testimony of Elmer Lysfjord.)

amples, in regard to the rest of these companies, Your Honor, with Mr. Black's permission.

You may bring in any additional examples you wish, to check the accuracy, Mr. Black.

Mr. Black: Thank you, Mr. Ackerson.

Mr. Ackerson: I will offer this Plaintiffs' Exhibit 34 relating to the Reeder Company, Mr. Black, under the same stipulation.

Mr. Black: Same stipulation and same reservation.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit No. 34 was received in evidence.)

Q. (By Mr. Ackerson): Mr. Lysfjord, I am handing you Plaintiffs' Exhibit 34 and ask you if you can describe that document, those documents?

A. It is a job folder for L. D. Reeder Company. [453]

Q. Do you have a folder there for the Rancho Santa Gertrude School? A. Yes, sir.

Q. And do you see, referring to Plaintiffs' Exhibit 26, a similar reference to that school in the Downer file, in the Downer exhibit?

A. Yes, sir.

Q. What, if anything, is there on the Downer exhibit that indicates who got the job?

A. Just the No. 6. And further down on the page the word, or the name, "L. D. Reeder Company."

Q. Do you note any figures, similar figures, that

(Testimony of Elmer Lysfjord.)

we have been discussing on the back of that page of the Downer Company document?

A. Yes, sir. I see a figure of \$2,400. However, it is scratched out and a figure above it of \$2215 inserted.

Q. What is the significance of that, if you know?

A. Well, the original figure given to the Downer Company for the bid of the Reeder Company was to be \$2400, and for some reason the Reeder Company changed their figure to \$2215.

Q. \$2215 you say is the figure that was actually settled upon, the last figure? A. Yes, sir.

Q. Does the sheet indicate what the Downer Company [454] bid? A. \$2520.

Q. Now turn to the Reeder documents and tell me, if you can, what the Reeder Company actually bid?

A. I find a notation on the Reeder Company's stationery for acoustical tile ceiling for the price of \$2215.

Q. Now, Mr. Lysfjord, do you have a folder in the Reeder Company for the temporary facilities, Long Beach State College? A. No, sir.

Q. Do you have any other folder there?

A. No, that is the only folder.

Q. Thank you.

I marked this folder and I am offering 31, Mr. Black, under the same stipulation and restrictions.
The Court: Received.

(The document referred to was received in

(Testimony of Elmer Lysfjord.)

evidence and marked Plaintiffs' Exhibit No. 31.)

Q. (By Mr. Ackerson): I am handing you a folder of documents marked Plaintiffs' Exhibit 31, Mr. Lysfjord, and I will ask you to examine those. Are they similar job files as to those you have been describing? A. Yes, sir.

Q. Do you have a folder there covering the Willowbrook [455] School? A. No, sir.

Q. Do you have a folder there covering the district administration office, warehouse building, Whittier? A. No, sir.

Q. Do you have a folder there covering Veterans Memorial Park, Welfare Building?

A. No, sir.

Q. Do you have a folder there for Sound Control Company? A. Yes, sir.

Q. Do you have a folder there covering the alterations and additions to the Roosevelt High School?

A. Yes, sir.

Q. Will you turn to that folder, please, and I call your attention again to Plaintiffs' Exhibit 22 and ask you if you find a document from the Downer Company in that exhibit relating to the same job? A. Yes, sir.

Q. Is there any indication on the Downer document whether or not Sound Control got the job?

A. In the upper right-hand corner the letters "SO," and a little further down on the page the words "Sound Control."

(Testimony of Elmer Lysfjord.)

Q. Now I want to ask you the same questions with respect [456] to the reverse side of that sheet you just referred to. Is there any indication on the Downer document as to what the Sound Control bid was? A. Yes, sir; \$4802.

Q. What did the Downer Company bid?

A. \$5186.

Q. Now turn to the Sound Control file you just mentioned—I believe it is Plaintiffs' Exhibit 34—and tell me if you can, what Sound Control actually bid?

A. Here is a computation sheet with a series of amounts of different types of insulation adding up to the total of \$4802.

Q. Now, Mr. Lysfjord, you have gone through similar documents from the Downer Company as they relate to Acoustics, Inc.? A. Yes, sir.

Q. I mean, you have gone through the same procedure, have you? A. Yes, sir.

Q. Is there any substantial difference in the documents supplied by Acoustics, Inc.—and I am referring to Plaintiffs' Exhibit 35, which I hand you—you have examined those documents, have you?

A. Yes, sir.

Q. And you have examined them in connection with [457] Plaintiffs' Exhibit 23, the Downer Company records? A. Yes, sir.

Q. Do you find the same or substantially the same relationship between the two documents, that is, the notations on the Downer documents and the

(Testimony of Elmer Lysfjord.)

bid prices on the Acoustics, Inc., documents, or are they substantially different?

A. They are identical.

Q. In other words, they work out the same way as we have illustrated on the board with respect to Shugart and Coast? A. Yes, sir.

Mr. Ackerson: I don't believe I have offered this Plaintiffs' Exhibit 35. I will do so with the same understanding.

Mr. Black: Same reservation.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 35.)

Q. (By Mr. Ackerson): Mr. Lysfjord, I am showing you Plaintiffs' Exhibit 32, which purports to be the documents of Coast Insulating Products, that is, the job files, certain job files of Coast Insulating Products, and I ask you if you have examined those documents in connection with the Downer document, Plaintiffs' [458] Exhibit No. 25?

A. No, sir, I didn't see that one.

Q. That one you haven't examined?

A. No, sir.

Mr. Ackerson: Will you bear with me just a moment?

Q. Have you reviewed the Denton files?

A. No, sir. You asked me so far the files that I have seen. The others I have not had an opportunity to check.

Mr. Ackerson: I see. I did not understand that.

(Testimony of Elmer Lysfjord.)

I thought you worked later last night, Mr. Lysfjord. I thought you had examined them all. That is the cause of my confusion.

Is your Honor's stopping time 4:30 or 4:45 tonight?

The Court: I thought I would gauge it by the fact that we were late getting started and would work on until 4:40. If it places you in a difficult position, why we will adjourn now. These cases are inherently tedious.

Mr. Ackerson: Yes, they are, and I would like to break off. I think I can finish these others—I won't go into them—I will just ask the general question, but I want him to look at them in order to not have to go into them, and then I will change the subject matter. So if you find it convenient or possible I would like to have an adjournment now.

The Court: We are pressed with a great deal of business in this department, but we can take the adjournment from now [459] until tomorrow morning. Let us try to start at 1:45 tomorrow. The jury are excused until that time.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 1:45 o'clock p.m., Wednesday, May 11, 1955.) [460]

May 11, 1955—1:45 P.M.

The Court: The litigants being represented, you may proceed.

Mr. Ackerman: Thank you, Your Honor.

Mr. Black: If the Court please, and Mr. Ackerson, there was a minor correction I would like to make in connection with the transcript. Do you have page 366, line 4, Mr. Ackerson, available?

Mr. Ackerson: From Volume 4, Mr. Black?

Mr. Black: In Volume 3.

Mr. Ackerson: Page 366——

Mr. Black: Line 4. It is in connection with the matter of the telephone and our stipulation that is shown on page 55 of the transcript, lines 4 to 5, I apparently misspoke myself and I am sure the record bears me out, Mr. Ackerson, that the only thing we know from the telephone company is the date the deposit on that telephone was made, which was January 4th.

We have stipulated that the installation must have been sometime after that date, presumably very shortly thereafter, but not necessarily on that date. I think that is——

Mr. Ackerson: If you make the statement, Mr. Black, that is satisfactory. Let the record be so corrected.

Mr. Black: That is our original stipulation. [462]

The Court: This is a correction of a statement made, rather than a correction of a stenographic error?

Mr. Ackerson: Yes.

Mr. Black: Yes.

Mr. Ackerson: If Mr. Black makes the statement, I am quite sure we will accede to it.

The Court: On page 354, in the same volume, in line 1, "Do you want the answer to the law part

of the question—" I think the word was the "last part" instead of the "law part."

Mr. Ackerson: I think that is correct.

The Court: Then at line 3 the word would be "last"—

Mr. Black: I understood the word to be "long." Could it have been that?

Mr. Ackerson: I know it was either "long" or "last," but it wasn't "law." So we can make it either one.

Mr. Black: Make it either one.

The Court: Let's make it "last."

Mr. Black: All right.

The Court: Also on page 374, the last line, I believe the word "that" should be "they," t-h-e-y.

Mr. Black: That probably is true.

Mr. Ackerson: Yes.

The Court: There being no objection, the transcript is deemed amended by this colloquy.

Mr. Ackerson: No objection, Your Honor. If the Court [463] please, Mr. Black has consented I might call a witness out of order for the purpose of convenience.

Is that satisfactory with the Court?

The Court: Certainly. [464]

Mr. Ackerson: I will call Mr. Hamiel.

FRANK W. HAMIEL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Frank W. Hamiel.

The Clerk: How do you spell your last name?

The Witness: H-a-m-i-e-l.

Mr. Ackerson: May I ask that this exhibit be marked Plaintiffs' Exhibit for Identification next in order?

The Clerk: Plaintiffs' Exhibit 38.

(The document referred to was marked Plaintiffs' Exhibit No. 38 for Identification.)

Mr. Ackerson: And may I ask that this next exhibit be marked likewise as Plaintiffs' Exhibit next in order?

The Clerk: Plaintiffs' Exhibit 39 for Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 39 for Identification.)

Direct Examination

By Mr. Ackerson:

Q. Mr. Hamiel, I show you——

Mr. Black: Pardon me. In order that I may understand what we are talking about, may I see them?

Mr. Ackerson: Yes. I am sorry. I have exhibited these to you before, Mr. Black. [465]

(Testimony of Frank W. Hamiel.)

Mr. Black: I know you have, but I didn't remember what they were.

(Exhibiting exhibits to counsel.)

Q. (By Mr. Ackerson): Mr. Hamiel, I show you Plaintiffs' Exhibit 38 for Identification and ask you if you can identify that exhibit?

A. Yes, sir. This was prepared by Mr. Waldron and myself.

Mr. Black: Mr. Hamiel, I can't hear you at this range.

The Witness: This was prepared by Mr. Waldron and myself.

Q. (By Mr. Ackerson): And will you state what the exhibit purports to be?

A. This exhibit purports to state the amount of damages incurred by Mr. Waldron.

Q. As a partner of aabeta company?

A. As a partner of the aabeta company.

Q. Does that purport to state the damage alleged to have been suffered by him separately as from Mr. Lysfjord? A. Yes, sir.

Q. Now I show you Plaintiffs' Exhibit 39 for Identification, and I wonder if you would tell us what that document is?

A. This is the damages incurred or purported to be incurred by Mr. Lysfjord.

Q. Now in connection with Exhibit No. 39 for Identification, [466] will you state briefly how that exhibit was prepared?

A. Well, Mr. Lysfjord was employed previously

(Testimony of Frank W. Hamiel.)

and had a normal wage that he made or commissions that he earned with this company, and that he normally expected to at least make as much money in his own partnership.

Q. As a basis for the preparation of this document, Mr. Hamiel, did you and Mr. Lysfjord examine documents purporting to substantiate his past earnings?

A. Yes, we took his income tax which he had filed and took the amount of money that he had earned off of them.

Mr. Ackerson: And those income tax returns have been submitted to you, Mr. Black, have they not?

Mr. Black: They have. That is, for Mr. Lysfjord only.

Mr. Ackerson: I am talking about Mr. Lysfjord.

Mr. Black: And only for 1951 and '52.

Mr. Ackerson: Yes.

Q. And you used the 1951-'52 income tax returns of Mr. Lysfjord in the preparation of this document?

A. Yes, sir, his earnings from the Downer Company, R. W. Downer Company.

Q. Now did you utilize any other documents in connection with the preparation of that document?

A. I had prepared a cost of tile that was actually paid through the aabeta company's books.

Q. And let me show you a bundle of documents here. [467]

I hesitate to mark anything like this in evidence,

(Testimony of Frank W. Hamiel.)

Your Honor. This is just a foundational witness.

Mr. Black, I wonder if I can have him identify these with the understanding that they may be kept in Court for any use you may wish to make of them without making them an exhibit for identification.

Mr. Black: I don't suppose there is any objection to making them an exhibit for identification. You don't have to offer them.

Mr. Ackerson: Very well. I will ask that they be marked Plaintiffs' Exhibit for Identification next in order as one exhibit.

The Clerk: That will be Plaintiffs' Exhibit 40 for Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 40 for Identification.) [468]

Mr. Ackerson: I will get an envelope to put those in later.

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 40 for Identification, and ask you if you can identify that series of documents?

A. These were invoices which were paid through the aabeta co. books for material for acoustical tile.

Q. In other words, they are all acoustical tile invoices? A. That is right.

Q. Covering what period of time?

A. Covering from the inception of the business to the present date.

Q. Do you know whether or not they included the original carload of acoustical tile purchased

(Testimony of Frank W. Hamiel.)

from The Flintkote Company? A. No, sir.

Q. That was purchased on——

The Court: Let's see. Are you saying you don't know or are you telling they do not?

The Witness: They do not include it.

Mr. Ackerson: Oh, I am sorry. I misunderstood the answer, Your Honor.

Q. (By Mr. Ackerson): They do not include it? A. No, sir. [469]

Q. In other words, this is acoustical tile purchased by aabeta co. subsequent to the first order they received from Flintkote?

A. That is right.

Q. These documents, Plaintiffs' Exhibit 38 for Identification and Exhibit 39 for Identification, accurately reflect the cost of the tile concerned in Plaintiffs' Exhibit for Identification last marked?

A. That is right.

Q. That is the figure—can you point out where that is reflected in each of those exhibits, Plaintiffs' Exhibit 38 and Exhibit 39 for Identification?

A. Actual cost of tile purchased was \$87,808.97.

Q. The same figure is reflected on both statements? A. Both exhibits, yes.

Q. Then what do the Exhibits 38 and 39 for Identification reflect with respect to that tile?

A. They reflect that that amount was paid and we have based an average cost based on the Pioneer-Flintkote's actual cost on the carload of tile, to arrive at an overpayment or an excessive cost of material.

(Testimony of Frank W. Hamiel.)

Q. You mean in excess above what Flintkote would have charged?

A. Would have charged them, yes.

Q. How did you arrive at that cost through this exhibit [470] for identification last marked?

A. We took the cost of the material, that is, the cost per square foot of the material.

Q. From whom?

A. From this Exhibit 40, purchased from the lot of various people.

Q. Yes.

A. And we got a price per foot on it, per average foot, and it came up 17 per cent higher than it would have cost if it had been purchased from the Flintkote people.

Q. Did you state, or, can you state to the Court and jury 17 per cent additional cost, that is, above the Flintkote price, is a minimum or is it an average or would you say it might be more or less than 17 per cent?

A. It was an average.

Q. Can you state whether or not that would be the actual figure considering all of the invoices in Exhibit 40 for Identification?

A. It would have been the case if the tile had remained at the same cost we were using for a basis.

Q. What cost did you use?

A. 10.5 cents per square foot for the 1/2-inch tile.

Q. 10.5 you used? A. Yes.

Q. 10 cents and a half? [471]

A. I think that was it, yes, sir.

Q. For the cost of the Flintkote tile?

(Testimony of Frank W. Hamiel.)

A. Yes.

Q. From that base figure you figured that the cost of all the tile purchased through these invoices in Exhibit 40 for Identification was 17 per cent higher than that? A. That is right.

Q. Now, did you assist in preparing the other figures relating to other assets or the other figures on these exhibits? A. Yes, I did.

Q. That is, 38 and 39 for identification?

A. Yes, sir.

Q. Were they done under your supervision?

A. Yes, sir.

Q. Did you inspect the work later?

A. That is right.

Q. Do you approve the figures, the computations? A. That is right.

Q. Mr. Hamiel, what is your occupation?

A. I am a public accountant.

Q. How long have you been a public accountant?

A. Ten years.

Q. Is that your sole occupation?

A. That is right. [472]

Q. Do you practice that profession generally?

A. Yes, sir.

Q. It isn't restricted to acoustical tile?

A. No, sir.

Mr. Ackerson: Will you require any further foundation from this witness, as to these two exhibits, Mr. Black?

Mr. Black: That is the only testimony you are going to elicit from Mr. Hamiel?

(Testimony of Frank W. Hamiel.)

Mr. Ackerson: I am going to a slightly different subject, while he is on the stand. It will be very brief.

Mr. Black: I want to interpose an objection to these documents if your purpose is to offer them now.

Mr. Ackerson: No.

Mr. Black: Not on the ground no foundation has been laid, necessarily; reserving that, among other things. But I would like to know what he used, what books he used, if any, in coming to these figures, if you are going to——

The Court: It occurs to me that the witness has stated that the documents reflect damage sustained, but how does he know what damage was sustained?

The documents might reflect losses incurred in certain operations, because of being prevented from performing certain operations: But for him to state that in terms of damages is a legal conclusion.

Mr. Ackerson: Well, I think Your Honor is right, excepting [473] only insofar as the mechanical facts contained in Exhibit 40 for Identification are concerned.

The documents do contain other elements of damage, which I think are based upon knowledge within the sphere of the two plaintiffs. But I wanted to clear the first part of the exhibits, which relate only to excess prices.

The Court: Having heard this testimony, but not having seen the exhibits which are thus far for identification only, I can't tell whether he is includ-

(Testimony of Frank W. Hamiel.)

ing items which would be properly chargeable upon the plaintiffs' theory of the case or whether he is including items which would not be so chargeable, or just what the items are. I think foundation should be such that the jury can tell and the Court can tell what the conclusions are based upon. [474]

Mr. Ackerson: I think perhaps you are right, Your Honor. Maybe I can go over them item by item and let's get the foundation, Mr. Hamiel. That is the basis for your computations here.

Q. We will refer to Exhibit 38 for Identification first. You have an item here, "Actual Cost of Tile Purchased, \$87,808.97." That refers to tile purchased during what period?

A. Since the inception of the company until the present date.

Q. Excluding the original carload of Flintkote tile? A. Yes, sir.

The Court: By "present date," do you mean today?

The Witness: The date of this operation which was about a week ago, May 3rd.

Q. (By Mr. Ackerson): Where did you get that information?

A. That was taken from the aabeta company's files.

Q. And by files, do you refer to Exhibit 40 for Identification? A. That is right.

Q. In other words, that is a tally or a total of all the invoices for acoustical tile in the aabeta company's files?

(Testimony of Frank W. Hamiel.)

A. That is right, other than Flintkote. [475]

Q. And you added those up and that came to a total of \$87,808.97? A. Right.

Q. Then you have another item under that, "Estimated Cost from Distributor based upon 17 per cent overpayment for tile." Upon what basis did you arrive at that figure, and the figure is \$66,503.40?

A. Each of these invoices listed a unit price per foot, per square foot, and the tally was made of the unit price per square foot, and it was divided to get an average cost per square foot.

Q. And you found that the average cost per square foot on that basis—

A. Was 17 per cent higher than the other charges.

Q. And the other charge, by that what do you mean?

A. The charge that they paid for their carload of material.

Q. From Flintkote? A. Yes, sir.

Q. And what did you find was the price charged by Flintkote for that carload they bought from them? A. Well, as I remember it, it was 10.5.

Q. It could have been 10 cents or it could have been 10.5? A. Yes. [476]

Q. But in any event you used that, you deducted the price charged directly by Flintkote, you deducted that from the price actually paid through these invoices in Exhibit 40 for Identification?

A. The average price actually paid.

(Testimony of Frank W. Hamiel.)

Q. And you arrived at what figure?

A. At a 17 per cent markup.

Q. Can you point out the figure representing that 17 per cent markup?

A. The \$87,808.97, that is, the actual cost of the tile that was purchased from other vendors——

Q. Yes.

A. ——if that represents a total of 117 per cent of the actual cost that would have been paid if they had bought the tile from Flintkote——

Q. Yes.

A. ——this second number here then would be the actual cost of the tile if it had been purchased from The Flintkote Company.

Q. And that is based on the price actually paid by aabeta company to The Flintkote Company?

A. That is based on this number here representing 117 per cent of the cost of the material if it had been purchased from Flintkote.

Q. How did you find out the price that would have been [477] charged by Flintkote? How did you arrive at that figure?

A. We knew what the price charged by Flintkote was.

Q. That was supplied to you by the aabeta company?

A. That was supplied by the aabeta company, that is right.

Q. And that figure is \$66,503.40. Then you deducted one from the other? A. That is right.

Q. And you arrived at what figure?

(Testimony of Frank W. Hamiel.)

A. \$21,305.57.

Q. Which denotes what?

A. Denotes the excess of moneys paid for acoustical tile to these vendors listed in this exhibit rather than—

Q. Pardon me. By “this exhibit” you are referring to Exhibit for Identification No. 40?

A. Yes, sir—rather than if the tile had been purchased directly from The Flintkote Company.

Q. Then what did you do on this exhibit?

A. I charged one-half, or took one-half of that number as being the share that would be applicable to Walter Waldron.

Q. You state “that number”; you are referring to the figure \$21,305.57? A. That is right.

Q. And you allocated one-half of that number to Mr. Waldron? [478] A. That is right.

Q. And that number is what?

A. That number is the share chargeable to him.

Q. Which is— A. \$10,652.78. [479]

Q. Now is that the same method you used in arriving at the figures on Exhibit 39 excepting only that that applies to Mr. Lysfjord, is that right?

A. That is right.

Q. And the figures are the same in those respects? A. That is right.

Q. Now did you have anything to do with the figures on the top of the page? A. Yes, sir.

Q. In other words, you have an item here, “Commissions and expected profits, seven months, at

(Testimony of Frank W. Hamiel.)

\$3160 per month, equals \$22,120." What does that figure mean, if you know?

A. One-half of that number would represent the commissions that Mr. Lysfjord, had he continued to operate on the same rate of commissions that he had when he worked for the Downer Company, with no increase or decrease in his sales.

Q. Yes?

A. It is predicated upon a markup common to the acoustical business, I think, of one-third profit, gross profit——

Q. Yes?

A. ——Mr. Lysfjord at the time he worked for the Downer Company received approximately 10 per cent of the sales price of the contract as his commission. 10 per cent approximately would be allocated to the profit for the Downer Company, and 10 per cent would be allocated for the overhead incurred by [480] the Downer Company.

Q. Yes?

A. Mr. Lysfjord in his own company would normally expect to not only earn his commissions as selling the job, but he would also expect to earn the 10 per cent for the profit since he owned half the company. That is what this number, \$3160, is compounded upon.

Q. That \$3160 per month, then, consists, as I understand it, or is based rather, upon the 10 per cent commission for sales? A. Yes.

Q. And the 10 per cent expected normal profit on a job? A. That is right.

(Testimony of Frank W. Hamiel.)

Q. The other 10 per cent being overhead?

A. That is right.

Q. Which is not considered in this \$22,120?

A. No, sir.

Q. Now, if you know, or if you participated in this part of the exhibit, you have an item, the second item from the top of the page, "San Bernardino expense, \$960." Do you know how that was arrived at and can you tell us?

A. When the company was started up they had an office in San Bernardino, I think primarily at the request of The Flintkote Company. [481]

Q. You were informed they had an office in San Bernardino?

A. That is right. That office cost them \$1920, and one-half of that was chargeable to Mr. Lysfjord.

Q. Were you informed that the office itself cost \$1900 or does that purport to be the total San Bernardino expense? Will you examine that and tell me that, if you can?

A. They had a rental of \$60 a month for a year, and they had utilities and trucking and commissions expense of \$500 and \$700 respectively in order to operate that business. [482]

Q. So that that total constitutes the sum of \$960.00 on the Lysfjord exhibit?

A. That is right.

Q. Now, do you represent the aabeta co. as a public accountant? Have you done their work along that line?

A. Yes, sir.

Q. These computations, both in the recapitula-

(Testimony of Frank W. Hamiel.)

tion on the first page and on the explanatory pages following, were those computations made under your supervision and direction? A. Yes, sir.

Q. And did you check them? A. Yes, sir.

Q. Can you state they are accurate, according to the Exhibit 40? A. They are.

Q. And the information supplied to you by Mr. Lysfjord and Mr. Waldron? A. Yes, sir.

Q. Did you use any other exhibits in preparation of those two documents, Exhibits 38 and 39 for Identification? Did you use the aabeta co.'s account book which I show you?

A. Yes, sir, we used the account book; the general ledger, too.

Q. Did you use Mr. Lysfjord's income tax return? A. Yes, sir. [483]

Mr. Ackerson: I am going to mark these for identification, too, Mr. Black, without introducing them.

Mr. Black: Very well.

Mr. Ackerson: If I may.

The Clerk: Plaintiffs' Exhibit 41 for Identification.

(The documents referred to were marked Plaintiffs' Exhibit 41 for Identification.)

Q. (By Mr. Ackerson): In other words, Mr. Hamiel—

Mr. Black: Is 41 the income tax?

Mr. Ackerson: Yes, the income tax only, Mr. Black.

(Testimony of Frank W. Hamiel.)

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 41 for Identification, and ask you if these are the income tax returns which you used in connection with Plaintiffs' Exhibit 39, Mr. Lysfjord's table? A. They are, yes.

Mr. Ackerson: I will ask the clerk to mark aabeta co.'s—

Q. (By Mr. Ackerson): What do you call this book (indicating)? A. General ledger.

Mr. Ackerson: I will ask you to mark the general ledger of aabeta co. as Plaintiffs' Exhibit next in order, 42.

The Clerk: Plaintiffs' Exhibit 42 for Identification.

(The document referred to was marked Plaintiffs' Exhibit 42 for Identification.)

Q. (By Mr. Ackerson): Now, can you state, Mr. Hamiel, [484] in what manner you used Plaintiffs' Exhibit 41 for Identification in preparation of this document, Plaintiffs' Exhibit 39 for Identification, Lysfjord's exhibit?

A. We took the income from Mr. Lysfjord's income taxes for 1951 and '52, and arrived at the amount of commissions that he had earned during the year, during that time.

Q. From the Downer Company?

A. From the R. W. Downer Company only.

Q. Yes. Does that show on this Exhibit 41 for Identification? Do the commissions show on this? I assume they do some place.

(Testimony of Frank W. Hamiel.)

A. Commissions are listed here as \$2,147.98—pardon me, that is wrong. That is the withheld tax. \$12,739.85 was wages earned in 1951—paid in 1951; I will say that.

And in 1952 income tax return, it shows a payment for commissions from the R. W. Downer Company of \$6,541.20.

Q. Yes. And you utilized those two figures in determining the commissions earned from the Downer Company during what period of time?

A. During the year 1951. The amount of income is shown on his 1952 income tax return from the Downer Company, which were for jobs that he had sold during the year 1951, but had not been paid for yet.

Q. So that you accumulated all the payments from the Downer Company on the '51 return and the '52 return in determining [485] the earnings for '51? A. That is right.

Q. Now, in what respect, if any, did you utilize Plaintiffs' Exhibit 42 for Identification, which is the aabeta co. accounts book?

A. In the computations of the Exhibit 39 we came up with a total estimated profits during the three-year period, what they would have been if they had been functioning under the theory suggested here, and from that number we subtracted the amount of profit that they actually earned during the same period from the aabeta co.'s general ledger.

Q. Well now, I think Mr. Black will forgive me for leading a little bit.

(Testimony of Frank W. Hamiel.)

Mr. Ackerson: If you don't, I know you will tell me.

The Court: If he doesn't, he can object and we will rule on it.

Q. (By Mr. Ackerson): In other words, I take it that you discussed this matter of Mr. Lysfjord's and Mr. Waldron's business with them as to their anticipated or expected profits? A. Yes, sir.

Q. And your function was to take the figures they gave you and to deduct the actual profits they made from the business——

A. That is right. [486]

Q. ——during the priod involved?

A. That is right.

Q. So that your function there was really the mechanical process, in this respect was the mechanical process of adding and subtracting?

A. That is right.

Q. And otherwise you took Mr. Waldron's and Mr. Lysfjord's information and figures, and then you used the actual figures from the books, Plaintiffs' Exhibit 42 for Identification, to determine the actual profit? A. That is right.

Q. Very well. And that is true on both, what you have stated is true on both Exhibits 38 and 39 for Identification? A. That is right.

Q. In order not to be in error, did you examine Mr. Waldron's income tax returns in determining his earnings from the Downer Company during '52? Were they submitted to you?

A. Yes, I had them on my files.

(Testimony of Frank W. Hamiel.)

Q. You did examine Mr. Waldron's income tax returns? A. That is right.

Q. And you check the income purported to be stated in Exhibit 38 with the income listed on his tax returns? A. That is right.

Q. Do you have those tax returns with you? [487] A. No, sir.

Q. Could you produce them if we asked you to?

A. Yes, sir; the copies.

Q. I mean the copies. A. Yes.

Q. I understand Uncle Sam has the originals.

Mr. Ackerson: I will lay a further foundation for these documents. I am not offering them at this time, Mr. Black.

Mr. Black: The Court please, I am going to object to these documents when they are offered in evidence, because it is our contention that they amount, in effect, to a brief on the theory of damage, which we do not accept.

And also they will attempt to go beyond the period which we submit is relevant to the consideration of damage. There are certain items in this statement which may well be relevant to consideration, but the entire document as prepared, in effect, is a brief or a position, rather than a record of performance. They are not offered yet, but I am simply reserving that position.

Mr. Ackerson: I wonder if Your Honor would care to look at them?

The Court: Yes. The Court hasn't seen them. Conventionally, the item claimed to be an item of

(Testimony of Frank W. Hamiel.)

damage is received into evidence through the testimony of a witness, and then some such witness as the one now on the stand is called [488] to give a summary.

Mr. Black: Yes.

The Court: I assume that what we are having here is a summary based upon testimony which is offered through the witnesses Waldron and Lysfjord.

Mr. Ackerson: And which will be offered through Waldron and Lysfjord, Your Honor. I am not offering them at this time.

The Court: They are for identification only?

Mr. Ackerson: That is all, Your Honor, yes.

Mr. Black: Yes.

The Court: You are put upon notice by Mr. Black. He thinks there are things in here which are not proper items of damage, and I have wondered myself, as the case has progressed, as to what time would be a cutoff time, in the event the plaintiff is to recover, that is, if there has been a trust of the type you alleged and if the plaintiffs were damaged, how long do they continue to be damaged? Or does damage all accumulate by some date and then is cut off? If so, has that date occurred?

Mr. Black: We have briefed the point, if Your Honor please, on both sides rather extensively.

Does Your Honor wish oral argument on that point now, in addition to what we have said in our memoranda?

The Court: No. [489]

(Testimony of Frank W. Hamiel.)

Mr. Black: Because that precise point has been briefed. To summarize it, our position and Mr. Ackerson differs with us on that score, is that in this action damage resulting from acts done up to the time the suit is commenced is the limit of recovery.

The cases hold that in the question of a wrongful refusal to sell, if it is a wrongful refusal to sell, that is a series of continuing acts. In point of law there is no one single refusal.

Therefore, for any damage, if there were any damage sustained by any wrongful acts, if there were any wrongful acts subsequent to the filing of the complaint, such damage would have to be based upon a second suit alleging and proving, if the case comes to trial, there was not only a continued refusal, but that such continued refusal was based on a continuing participation in a conspiracy.

So that under the well-settled law in our position the damage date is limited to acts that were done, refusals to sell, only up to the time the complaint was filed in July, 1952.

Now, any damage that can be shown to have resulted from refusals to sell up to that date, even though the damage was sustained subsequent to that date, may be recovered if there is a recovery. But the cases completely, in our submission, unlike the case upon which Mr. Ackerson relies, where there [490] was a single tortious act, namely, a forced sale of a building with a 15-year lease on it, where a physical piece of property was taken away

(Testimony of Frank W. Hamiel.)

from the plaintiff, obviously, in that situation the damage flowing from that single wrongful act may be recovered in the action, because the wrongful act had been done prior to the commencement of the action, even though the damage was sustained beyond that date.

Not so in our case. Our case is the typical case of a refusal-to-sell situation, and if we ever get to the issue of damages in this case, it is within the principle of the authorities cited to Your Honor, which I have just summarized. [491]

Mr. Ackerson: I would like to reply very briefly, your Honor.

Of course the plaintiffs' position is simply this, that this present situation is exactly analogous to the Brookside case excepting only that the court there limited the right of recovery to the length of the lease, 15 years.

In other words, there was on tortious act there. A subsidiary of Fox West Coast, as an act of the conspiracy, compelled the sale of this theatre.

The Court: But it was one sale.

Mr. Ackerson: It was one sale. This is one cut-off. We were authorized and then we were disenfranchised. There has never been an act since.

Our contention is this, your Honor—

The Court: You did not have a franchise or contract for any definite period of time?

Mr. Ackerson: No, we had no written contract. They didn't give any. The evidence shows so far that these other people go on indefinitely.

(Testimony of Frank W. Hamiel)

Our position anyway is this, your Honor, that rather than being limited by the 15-year term of the Brookside case—and there are other cases cited in plaintiffs' brief which has nothing to do with the Brookside case but they involve the same principle—but rather than be limited, if we so sought to argue, we could legitimately argue, in my [492] opinion, your Honor, that we wouldn't be bound by a 15-year term. We are not a lease. The lease in this case actually is the conclusion of the jury based upon all the facts as to how long these people might have remained in business.

The difference, the distinction, which I think Mr. Black forgets is this—and I think he is talking about the Bigelow case, which is another motion picture case, as your Honor knows—but that damage in the Bigelow case, unlike one conclusive act like chopping off these plaintiffs from their source of supply, or taking a house that belonged to the Brookside people, in the Bigelow case it was a different type of continuing damage.

In other words, it was based upon a late run for pictures. These pictures are bought week by week and day by day. The plaintiffs come in and they say, we were damaged because every time, every day, we go up to buy a picture we are met with this same conspiracy, we have to play behind Joe Jones, our competitor, he milks the picture dry of its box office value, then we have to play it. Now that is a continuing damage by a continuing conspiracy.

(Testimony of Frank W. Hamiel)

And of course I don't contend but what the statute of limitations takes it and the damage is chopped off day by day because every day there is a new act under the conspiracy, every day there is a new piece of damage resulting from that act. They buy "Gone With the Wind" one week and they are held [493] behind their competitor as a result of a conspiracy.

The next week, they buy "Mr. Deeds Goes to Washington"—and, by the way, you can tell the last time I was to a picture show—but anyway the conspiracy continues on to the next week.

The Court: You have been since then.

Mr. Ackerson: I remember them, anyway.

But that is the situation that Mr. Black I think has inadvertently, and I say mistakenly, confused with the situation where a person is put in business, he proceeds in business and all of a sudden, through a tortious act, his business is taken away from him.

There is no evidence in this case that it was the custom of the trade for people to come up, let us take the other Flintkote dealers, to come up day by day and say, Mr. Flintkote, can I buy some more Flintkote tile today? No. They buy it once and they are terminated once, and that is finis.

So I think that is the distinction and I think that is the difference in our point of view, Mr. Black's point of view and mine. I think Mr. Black is confusing a continuing day to day conspiracy and the effects of the overt acts of that conspiracy with the

(Testimony of Frank W. Hamiel)

day to day damage resulting therefrom as distinguished from a case which I think is very parallel to the Brookside case and the other cases mentioned in Plaintiffs' memorandum, your [494] Honor.

The Court: Unfortunately, these memoranda on both sides were not filed until we were in [495] trial.

Mr. Ackerson: I realize that.

The Court: And unfortunately perhaps the court has been busy on one case in the morning and another in the afternoon continuously since then, and there are just so many hours in the day that you can read these things.

Mr. Black: Let me call——

The Court: So I am a little bit behind your thinking on it by reason of not having read everything that you have cited.

Mr. Ackerson: I realize that.

Mr. Black: Let me briefly state our position in reply to Mr. Ackerson. I think I won't be too long about it.

We don't rely on the Bigelow case as such. The only significance of that case is that the Supreme Court in that case pointed out that there were two actions, one suit for damages sustained up to the time the original suit was brought, and a second action for damages sustained subsequent to that date. And the Supreme Court recognized the propriety of that procedure.

The case which we have found most analogous to

(Testimony of Frank W. Hamiel)

the present situation in our estimation is a case that just couldn't be more on all fours with what we are dealing with here, and that is the case of Connecticut Importing Company v. Frankfort Distillers, a case in the Second Circuit, 101 F. (2d) 79——

Mr. Ackerson: Is that cited in the brief? [496]

Mr. Black: That is cited in the brief.

Mr. Ackerson: Thank you.

Mr. Black: That is in 101 F. (2d) 79.

The facts in that case were that the plaintiff recovered a judgment for treble damages in a suit brought under the Sherman Antitrust Act and tried to a jury. The plaintiff was a distributor in Connecticut for products manufactured by Frankfort Distillers, one of the defendants. The other defendants were distributors of the same products in Connecticut.

Plaintiff refused to conform to an agreement to maintain fixed prices and as a result he was cut off by the defendants from any further supply.

The court and jury found that this cut-off was the result of a conspiracy to maintain prices improperly, and that in consequence it was proper for a verdict to be recovered by the plaintiff.

However, the court in that action limited the recovery to damages which were sustained from refusals to sell up to the period that the action was brought. And on appeal the Circuit Court of Appeals had this to say:

“Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those

(Testimony of Frank W. Hamiel)

sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc., v. Cudahy Packing* [497] Co., 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced. *Lawlor v. Loews*, 235 U. S. 522-536, 59 L. Ed. 341. Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

So that in this case the issues, if there were a second suit for damages predicated on refusals to sell after the date of the complaint was filed in here, would have to show that there was a continued refusal to sell and a continued conspiracy and that such refusal was based on the defendant being a party to such conspiracy.

It is perfectly obvious that such issues cannot be

(Testimony of Frank W. Hamiel)

tried in a suit which alleges a conspiracy which happened before this [498] action was brought.

If there is any subsequent damage to be recovered for further refusals based on a continued conspiracy, they must be the subject of a subsequent [499] action.

Mr. Ackerson: May I say just one further word, your Honor, because I think Mr. Black has substantiated my position.

There is no quarrel between the decisions cited in my brief and in Mr. Black's brief, supplemental brief.

Mr. Black pointed out the distinction, but he superimposes upon the distinction, in order to justify his position, there were continued refusals. This isn't a business where you have continued refusals. You get one refusal and you are out of business. That is it. There is no evidence to the contrary, but Mr. Black read—

The Court: What do you do then, take the life expectancy of the partners?

Mr. Ackerson: It is possible. We don't intend to do that. We don't intend to go into speculation, your Honor, but in theory that is exactly true.

We don't intend to do that. We have brought damages up to the date of trial, right now. And we know what those damages are. That isn't speculative, but there is no reason in law why you couldn't use a mortality rate and let the jury decide how long these two people would get together in the future—I mean get along with each other in

(Testimony of Frank W. Hamiel)

the future and how long they would have continued business.

But the important point in Mr. Black's argument, and I think I am quoting him—at least, I am quoting from his [500] brief—he said you can't recover damages after the filing of a complaint, unless the damages resulted from an act prior to the filing of the complaint.

I think your Honor recalls that, and I think Mr. Black stated that. His brief states, in summary—and he is referring to the Brookside case here, which is merely a repetition—

“In summary, in the Brookside case the damages allowed as compensation for injuries in part sustained subsequent to the filing of the action, but which were the direct consequence of an act done prior to the commencement of the action.”

That is the distinction. Mr. Black, through argument or anything else, can't show in this case that there was any necessity, any use or any purpose in the subsequent request after Flintkote came in and said, “You can no longer buy our material.” Everything stems from that act, your Honor. All damages stem from that act, and your Honor's query is correct, theoretically.

I try to try cases practically. The damage here is—I do not wish to try to prove, try to ask this jury to guess how long these two partners would stay together in the future, beyond the date of this trial. I don't want them to guess on that, although I say

(Testimony of Frank W. Hamiel)

they would have a legal right on any reasonable evidence to make that guess. [501]

I am not going to ask them to do that. These tables go up to the date of the trial, May 3rd. And I say legally, and I think if your Honor reads the briefs that have been filed, and I realize it has been an imposition on the court to file them so late, but I don't think there is any doubt about that proposition of law.

The Court: I think about the only thing the courts could properly do with these cases where briefs are not filed on time is to refuse to try them until briefs have been filed. Just to simply put them off calendar.

I shall have to work Saturday and Sunday to catch up with what has been filed in this case since we started.

Mr. Ackerson: Your Honor, I filed a nine-page brief. I tried to make it brief.

The Court: It isn't just the brief, counsel, it is what is cited in the brief.

Mr. Ackerson: I realize that.

The Court: We have to read the cases. It is the custom of some of the judges, and I find it a pretty good one, where we have time to do it, to write in to the courts that have decided these cases and to get the briefs which were filed, or the records which were used in deciding the cases, so that we can better understand the decision.

You just can't do that when trial briefs are not

(Testimony of Frank W. Hamiel)

filed until the beginning of the trial. But we will try to live [502] with the situation.

I don't think I have been called on by either of you to rule now on anything.

Mr. Ackerson: No, your Honor. In fact, if it is necessary, your Honor, I will—I mean if it is necessary I think, at least, it is possible we could offer these two exhibits subject to some ruling of your Honor later.

I imagine there will be motions in this trial at the end of the plaintiffs' case, and this is probably the last, the end of the testimony.

So there may be necessity for a ruling. Perhaps a day's continuance would be advisable, if it becomes advisable. But there is no—in view of the fact that, as your Honor stated, These briefs were filed late, none of them are lengthy so far as the briefs go, but there are cases cited in them, that is true, your Honor.

But I am sure both parties would be happy to follow any suggestion the court may have along that line.

The Court: Mr. Lysfjord hasn't finished his direct examination?

Mr. Ackerson: No, he hasn't.

The Court: I assume there will be considerable cross-examination?

Mr. Ackerson: Yes.

The Court: This witness is going to be cross-examined. [503] From the pace the case is going, that it has taken, I suppose these events will prob-

(Testimony of Frank W. Hamiel)

ably take us through Friday, and I can catch up with my reading over the week end.

Mr. Ackerson: I would think, your Honor, I can't judge—I don't know how long Mr. Black's cross-examination of Mr. Lysfjord would be, but I anticipate after this witness on direct perhaps an hour or two of examination, direct [504] examination.

The Court: Well, let's get on with the testimony. You haven't offered these yet.

Mr. Ackerson: I have not offered them. I intend to put Mr. Lysfjord and Mr. Waldron on before I do.

The Court: All right. Well, I am simply alerted then to not make any fishing dates for the week end.

Mr. Black: We regret that necessity. If it is any comfort to your Honor, we haven't been spending our week ends fishing, either.

Mr. Ackerson: I am sorry to say my own brief, your Honor, appears to be just a little bit sloppy, shall we say. It was because I delved into it Saturday and dictated Sunday and filed it Monday. You can't do perfect work that way.

The Court: Well, it is a sorry state to see counsel so badly rushed when the case has been pending as long as it has.

Mr. Black: May I suggest an extenuation there? There are such things as issues that come up at the time of trial that we just can't predict in toto as to what is coming on.

Mr. Ackerson: Leaving this foundational testi-

(Testimony of Frank W. Hamiel)

mony, I wish to use this witness for one other purpose, your Honor, very limited purpose.

Q. (By Mr. Ackerson): Mr. Hamiel, were you ever in the acoustical tile contracting business yourself? A. Yes, sir. [505]

Q. What was the name of your company?

A. Allied Construction Speciality Company.

Q. What line of tile did you handle?

A. Simpson tile.

Mr. Black: What is the name?

The Witness: Simpson.

Mr. Black: Simpson. Oh, yes.

Q. (By Mr. Ackerson): From whom did you buy that tile? A. California Panel & Veneer.

Q. Did you obtain, if you know, manufacturer's list price on your purchases of that tile?

A. I didn't understand your question.

Q. Did you pay the manufacturer's list price or did you pay a markup, a price marked up for that tile, while you were in business, if you know?

A. The manufacturer's wholesale price is what we paid.

Q. Is that the same price that Mr. Lysfjord, for instance, bought this carload of tile from Flintkote Company?

A. It would be very close. I couldn't say it was exactly. As I remember, it was 10.2, Simpson tile was at that time. That was several years ago.

Q. Yes. Is that the tile you used in your business as an acoustical tile contractor? A. Yes, sir.

(Testimony of Frank W. Hamiel)

Q. Were you able to continue along with that tile? [506] A. No.

Q. Would you state what, whether you lost the Simpson line or the franchise, was that it?

A. At the time we started in business, the Simpson tile was a new product and they had a lot of trouble in production of the tile, mechanical difficulties with their drills. They weren't able to supply us with tile of a quality that was acceptable to the public.

Because of the fact that we had made contracts which called for tile acceptable under certain specifications, we had to buy tile from the outside, in order to fulfill those.

Q. I see. Now, from whom did you buy the tile from the outside?

A. I don't remember the names of the vendors. There were quite a few of them.

Q. What did you pay for that tile compared to your Simpson price?

A. Considerably over the wholesale price we would have with Simpson.

Mr. Black: I think this is getting a little far afield, if the court please, unless it is related in point of time to the exact period we are talking about, I can't see how it can have much relevancy to the issues involved here, as to comparative prices. [507]

Mr. Ackerson: I am not introducing it for that purpose, your Honor. I don't think it is too important, in view of the evidence that is already in the record.

(Testimony of Frank W. Hamiel)

The purpose is merely to show the necessity of being on a competitive basis, in order to stay in business.

If your Honor has any objection to it, or Mr. Black has any objection to it on that ground, I will forego the examination.

Mr. Black: It seems to me it is incompetent, irrelevant and immaterial as to what reason this particular man had to stay in business. There are too many personal variables to deal with that.

The Court: Are you objecting on that ground?

Mr. Black: That, among others.

Mr. Ackerson: You may cross-examine, Mr. Black.

Mr. Black: If the court please, without prejudice to our position, this exhibit is not admissible in evidence, but I wanted to interrogate the witness about some of the figures appearing on it. I think I have a right to do that under well settled principles.

The Court: Certainly.

Mr. Ackerson: I will stipulate there will be no prejudice, Mr. Black. [508]

Cross-Examination

By Mr. Black:

Q. Now, Mr. Hamiel, I will ask the clerk to supply you with the two documents in question, or do you have them with you?

A. Right there (indicating).

The Clerk: Exhibits 38 and 39.

(Testimony of Frank W. Hamiel)

Q. (By Mr. Black): Now, referring to No. 39, which is Elmer Lysfjord's—

The Court: I have been looking at the clock, the courthouse clock. It is about ten minutes after 2:00. By my watch is it almost 3:00.

Mr. Black: It is about eight minutes to 3:00.

The Court: Would you like to take the afternoon recess before starting this cross-examination?

Mr. Black: I think it would be just as well if we can do that.

The Court: All right.

(Short recess taken.) [509]

Q. (By Mr. Black): Mr. Hamiel, will you kindly turn to Exhibit No. 39, and I refer to the second calculation on that page, starting with "Actual cost of tile purchased." Do you find that figure?

A. Yes, sir.

Q. \$87,808.97? A. Right.

Q. And then the next line is "Estimated cost from distributor based on 17 per cent overpayment for tile," and you arrive at a figure of \$66,503.40.

A. That is right.

Q. Now the second figure should be the result of dividing \$87,808.97 by 1.17, should it not?

A. Yes, sir.

Q. Will you do that operation, please?

A. (Making calculation.)

Q. Have you made that calculation?

A. Yes, sir, but I don't get the same answer I got from the figure from the machine.

Q. Your answer is \$75,050.40, is it not?

(Testimony of Frank W. Hamiel)

A. Yes, sir.

Q. And the difference therefore instead of being \$21,305.57 is \$12,758.57, is that correct?

A. I didn't continue it. I will continue it. (Making [510] calculation.) That is right.

Q. And the share of that chargeable to Mr. Waldron and Mr. Lysfjord would be half of that figure, I presume? A. Yes, sir.

Q. Or \$6000 plus? A. Yes, sir.

Mr. Ackerson: What is the figure?

The Witness: I will divide it. (Making calculation.) \$6174. Am I correct?

Mr. Black: I didn't do that last operation. I got down to the \$12,000 figure, Mr. Hamiel.

Q. Did you get those figures originally from Mr. Lysfjord or Mr. Waldron or did you make that mistake yourself?

A. The mistake was made in the machinery, I am sorry. I should have rechecked it manually but it was done on machinery.

Q. You must have hit the wrong key?

A. Either that or there might have been a total in the machine. I couldn't say as to what caused it, sir.

Q. Well, now, the figure, Mr. Hamiel, of \$87,808.97 is the total of the invoices in the group that has been just simply offered for identification?

A. That is right.

Q. That includes some items that are not tile, doesn't it? [511]

A. It includes some items that are not acousti-

(Testimony of Frank W. Hamiel)

cal tile, as it is commonly known, decorative tile.

Q. Is nails known as some kind of tile other than acoustical tile?

A. No, sir, but they are used in the preparation of tile.

Q. But you include nails in that figure, don't you?

A. There is quite a pile of invoices there. I can't remember whether they were all exactly tile or not.

Q. What information do you have that Mr. Lysfjord and Mr. Waldron had to pay 17 per cent more for nails?

A. The 17 per cent was based not on the cost of the invoices but on the cost of the tile per square foot. It had no relationship to the total dollar value.

Q. The total dollar value, that \$87,000 figure is the total dollar volume of the invoices, isn't it?

A. Yes, sir.

Q. And you have applied 17 per cent to that total dollar figure, haven't you?

A. But the 17 per cent was not obtained by the total dollar volume other than in the amount of money.

Q. That is right.

A. I see what you mean. Yes.

Q. But if it be the fact that there are nails and other things like that included in the \$87,000 figure, you [512] have applied 17 per cent then to nails as well as to tile, haven't you? A. Yes, sir.

Q. Whatever is in that bunch of invoices you have worked it out on that calculation?

(Testimony of Frank W. Hamiel)

A. That is right.

Mr. Black: Now with the permission of Mr. Ackerson—and this may slightly be out of order as relates to your direct examination but in the interest of saving time while you are on the stand I want you to refer to Exhibit No. 16, which is a profit and loss statement already in evidence.

May we have that exhibit, Mr. Clerk, Plaintiffs' Exhibit 16?

(The exhibit referred to was passed to counsel.) [513]

Q. (By Mr. Black): I show you Plaintiffs' Exhibit No. 16, Mr. Hamiel, that has already been offered in evidence, and we understand that this was prepared by you? A. Yes, sir.

Q. It was based on the aabeta co.'s books and fundamentally from the ledger that has been offered for identification? A. Yes, sir.

Q. It has been suggested that this statement of profit and loss reflects only the sales of the Flintkote tile. Do you have any opinion on that subject one way or the other? A. No, sir.

Mr. Black: Will you kindly mark these for identification, please, as our Defendant's Exhibit next in order?

The Clerk: Defendant's E, F and G for identification.

(The documents referred to were marked Defendant's Exhibits E, F and G for identification.)

(Testimony of Frank W. Hamiel)

Mr. Ackerson: Have I seen those, Mr. Black?

Mr. Black: I don't think you have. This is a simple mechanical operation of taking the items from your own books which bring about this cost of sales, that \$15,000.00 figure, and refers to your ledger.

This is the breakdown of these figures here (indicating). These are inventory transfers; this is the Flintkote material (indicating). [514]

Mr. Ackerson: You are going to connect those up with those, are you?

Mr. Black: Yes, to reconcile that figure. It appears only \$4,000.00 of Flintkote material is included in here.

Q. (By Mr. Black): Now, referring first, Mr. Hamiel, to the figure in Plaintiffs' Exhibit No. 16, showing the item, Cost of Sales, \$15,552.94.

A. Yes.

Q. I show you a worksheet prepared under our supervision, which is based upon a check of the company's books, which shows the origin of this \$15,687.95 figure, together with a breakdown of the individual items, arriving at that total.

A. Yes.

Q. I will ask you to be good enough to check those two sheets and take a look at the ledger before you.

A. You want me to verify this against this (indicating)?

Q. And tell me whether this summary, Exhibit F for identification—E for identification, and the

(Testimony of Frank W. Hamiel)

breakdown, Exhibit F for identification, as checked by the ledger correctly shows the basis for the \$15,000.00 figure which is the cost of sales. [515]

A. (Examining records.) They appear to check with the books.

Q. Well, they seem to be correct?

A. Yes, sir.

Q. They purport to be based entirely on the books and they come out to your figure?

A. Yes, sir.

Q. Now the only Flintkote items included in that total of \$15,687.95 are the two transfers from inventory, am I not correct on that?

A. Well, I was just checking the numbers.

Q. Would you glance through that then?

A. (Examining records.) These numbers here you are referring to?

Q. Yes. Those are the two items that are marked I's, marked from inventory, on the defendants' E for identification; those are the only two Flintkote items, are they not?

A. Do you get this from the journal? At the end of the accounting period the variance between the actual inventory and the amount of material that was on hand naturally is increased or decreased according to the amount of material bought and used during that period.

Q. Well, my question is: Aside from the two items that are marked from inventory——

A. Aside from that they check, that is [516] right.

(Testimony of Frank W. Hamiel)

Q. —every item going to make up the \$15,000 figure is something other than a Flintkote item?

A. I don't know what those from inventory items are composed of.

Q. I will put it this way: Everything other than the inventory items are not Flintkote items.

A. Yes, sir.

Q. So that the most there could be of Flintkote items in this \$15,000 figure—and that would assume that both the inventory items are Flintkote items—would be \$4,142.89?

A. I don't know that I exactly follow you.

Q. I think you said that everything on the list other than the inventory transfers are not Flintkote items?

A. I said they checked. Now I didn't read down the vendor column.

Q. Would you do so, please?

A. Yes. (Examining records.) I think that is right, sir.

Q. So that my question is, if there are any Flintkote items in this \$15,000 figure they would have to be comprised of the inventory transfers?

A. No, these amounts of money—you see, we started off the inventory with a certain figure, whatever was actually in the warehouse, and we counted the value of it. It comprises many things. Materials which were purchased for installation, [517] nails and all the other sundry materials that are used in the installation of acoustical tile, are purchased dur-

(Testimony of Frank W. Hamiel.)

ing the accounting period and charged into the cost of sales.

At the conclusion of the accounting period an inventory is taken and they count all the material that is left. It obviously would be different, higher or lower, than the material that the inventory that they started with showed. These numbers increase or decrease the inventory figure to bring it to its proper level, that is all. It is merely a bookkeeping transaction. It has nothing to do with actual materials that are bought and sold.

Q. Well, when an item is transferred from inventory it is charged to cost of sales, is it not?

A. Yes, sir.

Q. And that is what you have done with these two operations here?

A. But actually I can't say that they are tile or what they are.

Q. My question is—you say you can't tell what they are—but the only thing that could be Flintkote items would be these inventory transfers?

A. That would be if there were any, which I didn't check the vendors' names against the books.

Q. I understood you had just done so.

A. I checked the numbers. I understood you wanted me [518] to check the amounts.

Q. You just checked the vendors and you said there were no Flintkote names?

A. That is correct.

Q. My question is, if there are any Flintkote

(Testimony of Frank W. Hamiel.)

items in this \$15,000 figure, it would have to be at least a part of the inventory transfers?

A. That is right.

Q. And that totals \$4,142.89?

A. That is right.

Q. And that is the maximum amount of Flint-kote products that could be included in the \$15,000 figure? A. Yes, sir.

Mr. Black: I will offer this exhibit in evidence, if the court please.

Mr. Ackerson: No objection, Mr. Black.

The Court: Received.

The Clerk: Is that E, F and G, Mr. Black?

Mr. Black: Yes, E, F and G.

(The exhibits referred to were received in evidence and marked as Defendants' Exhibits E, F and G.)

Q. (By Mr. Black): Now the records, at least for the year 1952, Mr. Hamiel, were kept on a modified cash and accrual basis, is that [519] correct? A. Yes, sir.

Q. And except at year end there was no account taken of accounts payable in making up the statement of profit and loss? A. No, sir.

Q. So that this statement, this six-month statement for the year 1952 which we have just been talking about, doesn't show accounts payable at the end of that period?

A. Not as I remember it, no, sir.

(Testimony of Frank W. Hamiel.)

Mr. Ackerson: Have you got it? Can the witness see it?

Mr. Black: That is the same exhibit. It is just a summary.

The Witness: Accounts payable don't appear on the profit and loss statement.

Mr. Ackerson: I don't know. I am not an accountant.

Q. (By Mr. Black): But at year end you did take them into account, did you not?

A. Yes, sir.

Q. And that is what you have done for the balance sheet as at December 31, 1952?

Mr. Ackerson: Mr. Black, do you want to introduce that? I neglected to do so.

Mr. Black: Yes.

Mr. Ackerson: If you wish, go ahead. [520]

Mr. Black: May I have it marked for identification?

Mr. Ackerson: You can make that a plaintiffs' exhibit if you wish, or you can make your own. I don't care.

The Clerk: Is this a defendants' exhibit?

Mr. Black: Yes, you can make it our number next in order.

The Clerk: Defendants' Exhibit H.

(The exhibit referred to was received in evidence and marked as Defendants' [521] Exhibit H.)

Q. (By Mr. Black): I now show you a balance

(Testimony of Frank W. Hamiel.)

sheet and a profit and loss statement for the year 1952. The balance sheet as of December 31, 1952, and profit and loss statement for that entire calendar year. A. Yes, sir.

Q. You prepared that, did you not, Mr. Hamiel?

A. Yes, sir.

Q. Will you kindly state what the net profit for the year 1952 was, as disclosed by that statement?

A. \$4,860.14.

Q. Now, that would not, however, mean that that was a reflection of a change from a profit of over \$8,000.00 at June 30th, down to a profit of only \$4,800.00 in the last six months? It wouldn't necessarily mean that, would it? A. No.

Q. Because of the fact in the six months' period you do not take into account accounts payable?

A. There are quite a few factors that weren't taken into account at the middle of the year.

Q. So that you don't get a true picture of net profit by this semiannual statement for that reason, and perhaps for other reasons?

A. No, just a trend was all.

Q. Now, referring to Mr. Lysfjord's income tax return for the year 1951— [522]

Mr. Black: Do we have that, Mr. Clerk, please?

The Clerk: Yes, sir.

Q. (By Mr. Black): —the only income shown on that return is that derived from the R. W. Downer Company, am I correct on that?

A. That is right.

Q. Will you state the total of that figure?

(Testimony of Frank W. Hamiel.)

A. \$12,739.85.

Q. Now, this return, was that prepared by you, by the way? A. Yes, sir.

Q. It is prepared on a cash basis, is it not?

A. That is right.

Q. So that that figure of \$12,739.85 would reflect commissions perhaps earned in 1950, but not paid until 1951? A. It could have, yes, sir.

Q. So that when you take your 1952 return and throw that back into 1951, to arrive at a \$1,500.00-a-month earning basis, did you also deduct commissions that had been earned in 1950, but which were recorded in the 1951 return? A. No, sir.

Q. As to that \$1,500.00 figure, it would probably be distorted? A. \$1,500.00?

Q. For a figure of \$1,500.00 a month. I am referring [523] to your calculation.

A. In any—

Q. Just a moment. I think maybe I should make myself clear. I perhaps did not do so.

On page 2 of this Exhibit 39 for identification we show a figure of \$1,580.00, as salesman's profit. That is a figure, a monthly figure, isn't it?

A. That is right.

Q. Did you make out that figure?

A. Yes, sir.

Q. You arrived at it, did you not, by taking the entire income for the year 1951? A. Yes.

Q. And then adding to it the 1952 income?

A. From the Downer Company.

Q. From the Downer Company? A. Yes.

(Testimony of Frank W. Hamiel.)

Q. And then dividing—— A. By 12.

Q. But you included in it all of the \$12,739.85 in the 1951 income? A. Yes.

Q. And that figure could include commissions that were, in fact, earned in 1950, but which weren't paid until 1951, could they not? [524]

A. It could, yes.

Q. To get a true figure, if you are going forward in '52 and figure out a monthly income, you should deduct the commissions earned in '50 that are reflected in the '51 income tax return? Am I not correct on that? A. Yes, sir.

Q. You didn't do that?

A. No, because we didn't know which ones. We didn't have a copy of the '50 income tax return, first of all.

Q. So you simply put them in, anyway?

A. No, sir, that wasn't it at all. This was the only information we had to figure from, and, as I said, that was based upon information given me.

Q. But if there were any commissions that were, in point of fact, earned in '50, but not paid in '51, it could distort the figure, could it not?

A. If there were, yes, sir.

Q. Now, referring to Exhibit 39, do you have it in front of you?

On the second page of that the last calculations on that page refer to the approximate cost of one carload of tile as \$8,000.00. You say the average sales price of a carload of tile is \$18,000.00; approximately 30 per cent of \$18,000.00 is gross profit.

(Testimony of Frank W. Hamiel.)

What did you base that 30 per cent figure on, Mr. Hamiel? [525]

A. It was given to me by Mr. Lysfjord and Mr. Waldron.

Q. You didn't make any attempt to check it yourself?

A. Only to the extent that I know that when I was in business we used that figure.

Q. Do you know what the actual experience of the aabeta co. was? A. No, sir.

Mr. Black: I am, of course, unable to check Mr. Waldron's income tax returns. I presume that will be made available?

Mr. Ackerson: That will be made available, Mr. Black.

Mr. Black: May I ask him questions about it?

Mr. Ackerson: You may.

Mr. Black: Because I don't want to bring him back.

Mr. Ackerson: You may, certainly.

Q. (By Mr. Black): Did you go through a similar operation to determine Mr. Waldron's net income?

A. No, sir. Mr. Waldron gave me the figures we started off with.

Q. Did you use his income tax return as a basis?

A. No, sir.

Q. You didn't examine them in that connection?

A. No.

Mr. Black: I think that is all, Mr. Hamiel.

Mr. Ackerson: I have one or two questions. [526]

(Testimony of Frank W. Hamiel.)

Redirect Examination

By Mr. Ackerson:

Q. Mr. Hamiel, forgive me if my questions are not pointed, as I am not an accountant.

Mr. Black has asked you concerning the exhibits relating to the income taxes. Do you have those there?

Will you turn to Mr. Lysfjord's 1952 income tax return and tell me what figure you have relating to his Downer income? A. \$6,260.81.

Q. Is that the '52? A. Yes, sir.

Q. You have no way of knowing how much of the '51 income reported from the Downer Company was earned in '50, have you? A. No.

Q. And vice versa, of course, for the prior years?

A. No, none at all.

Q. You don't know then whether or not the \$6,000.00 attributed to the 1952, reported on the 1952 income tax, may or may not balance out what was collected from the prior year of 1950 and added to the '51 tax, do you? A. No, sir, I don't. [527]

Q. Now Mr. Waldron, you stated, gave you the figures which you used regarding his income from the Downer Company during 1951?

A. Not exactly, sir. I said that he gave me the figure that he was earning when he left the Downer Company.

Q. What were those figures, for what period of time, approximately?

(Testimony of Frank W. Hamiel.)

A. I understood he said he was making about \$1,250 a month when he left the Downer Company.

Q. And that was the basis that you used?

A. Yes, sir.

Q. Now, did Mr. Lysfjord make any statement to you or did you use similar figures for him in addition to his income taxes?

A. We used Mr. Lysfjord's income tax to predicate his average earnings per month.

Q. And that was the basis of your figures for Mr. Lysfjord? A. That is right.

Q. You did not inquire into what his last few months' salary was? A. No, sir.

Q. At the Downer Company? A. No, sir.

Q. Now on this first figure—I think I am getting [528] into something, Mr. Hamiel, that I am going to have to ask Mr. Lysfjord and Mr. Waldron about.

At any rate, your testimony as a whole is that other than Plaintiffs' Exhibit 40 for identification, including the invoices, which was a mechanical operation on your part, was it not—

A. Yes, sir.

Q. —the information was supplied to you either through Mr. Lysfjord's income tax returns or through information supplied to you, figures supplied to you, by Mr. Lysfjord and Mr. Waldron?

A. That is right.

Q. And you assisted in the computing angle of that data? A. That is right.

(Testimony of Frank W. Hamiel.)

Q. In connection with the matter of Exhibit 40 for identification, do you know—you yourself have personal knowledge—as to whether or not the \$87,808 figure on each Exhibit, 39 and 38, included prices paid for such things as nails, cement, or do you know whether or not they were limited to the price paid for acoustical tile?

A. My understanding was that they were—the recapitulation page which was prepared from all of those invoices, in all cases except one, lists a price per unit per square foot of tile that was [529] purchased.

Q. Do you find any reference to such items as nails or cement or the complementary materials that go into an installation job?

A. There are a few.

Q. Will you give the amounts and the items that you see there?

A. There were nails in the amount of \$40, there were nails in the amount of \$3.70, there were nails in the amount of \$5.50, staples in the amount of \$19.50, staples in the amount of \$11.70.

Q. And other than that can you state that this \$87,000 plus figure was acoustical tile, or do you know?

A. It is acoustical tile or decorative tile.

Q. But it is all tile? A. Yes, sir.

Mr. Ackerson: I think that is all.

Mr. Black: One question.

(Testimony of Frank W. Hamiel.)

Recross-Examination

By Mr. Black:

Q. Isn't it possible, Mr. Hamiel, that some of that is insulation board?

A. Yes, sir, insulation board.

Q. That is not acoustical tile, is it?

A. Well, I am not conversant with the definitions.

Q. You used to be in the business, didn't [530] you?

A. That is right. But my part of the business was not connected with the actual installation of tile.

Mr. Black: That is all.

(Witness excused.)

Mr. Ackerson: I will recall Mr. Lysfjord.

ELMER LYSFJORD

recalled as a witness by and on behalf of the plaintiffs, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Ackerson:

Q. Mr. Lysfjord, when we adjourned yesterday you were going to look over some files and determine whether or not you could testify in a similar vein with regard to the Downer documents and the acoustical tile contractors' job folders. I am show-

(Testimony of Elmer Lysfjord.)

ing you Plaintiffs' Exhibit 27 and Plaintiffs' Exhibit 30 for identification, and ask you if you examined those documents over the evening?

A. I did.

Q. How many of the folders or how many jobs in the Exhibit 30 for identification did you find corresponded with the jobs listed in Exhibit 27?

A. Only one.

Q. And did you find any relationship otherwise?

A. I don't understand you.

Q. I mean, did any of the other jobs in [531] Plaintiffs' Exhibit 30 have any bearing on the other matters listed in the other exhibits?

A. No, sir.

Q. What job did you find corresponded in Plaintiffs' Exhibit 30 with the jobs listed in Plaintiffs' Exhibit 27?

A. The Washington Street School, or a Washington School.

Q. That is the first one on Plaintiffs' Exhibit 27?

A. Yes, sir.

Q. And will you tell us according to the Downer records, Plaintiffs' Exhibit 27, what company performed the Washington Street School job?

A. The Paul H. Denton Company.

Q. Can you tell us from that document what the Paul H. Denton Company was purported to have bid on that school, according to the Downer records?

A. Yes, sir. \$3,271. There is an additional figure of \$1,268.

(Testimony of Elmer Lysfjord.)

Mr. Black: I can't hear you. May I have that last figure?

The Witness: \$1,268.

Mr. Black: Thank you.

Q. (By Mr. Ackerson): And what do the Downer records show with respect to the Downer bid? [532]

A. The Downer bid was \$3,435. And the second figure was \$1,332.

Q. Now, can you turn to that bid and tell us what the Denton Company bid on the job?

A. A total contract of \$4,539.

Q. Now, Mr. Lysfjord, I am going to call your attention to Plaintiffs' Exhibit 39 for identification, which I now hand you. Will you tell us what your part was in compiling that exhibit?

A. I was present at the offices of Mr. Hamiel and we went through the income taxes of previous years for me, and also consulted our books, our general ledger here, for information required to answer these questions.

Q. Did you also consult the documents contained in the exhibit before you, Plaintiffs' Exhibit 40 for identification? That is the other document.

A. The income tax?

Q. No, the file of invoices here.

A. Oh, yes, sir.

Q. And did you personally supervise and instruct the compilation and examination of Exhibit 40 for identification?

(Testimony of Elmer Lysfjord.)

A. Mr. Hamiel had a girl in to do the mechanical aspects of it. However, I answered——

Mr. Black: Pardon me. Did you say Exhibit 40?

Mr. Ackerson: Those were the invoices. [533]

Mr. Black: Oh, yes. I am sorry.

Q. (By Mr. Ackerson): Go ahead, Mr. Lysfjord.

A. I was saying, Mr. Hamiel had a girl in to do the mechanical gathering of this information from our files. [534]

Q. At your request? A. Yes, sir.

Q. Go ahead.

A. Occasionally there was a question asked of me, what was to be included, because this girl was not familiar with the type of work we had been doing. I will answer this question about nails asked before——

Q. I will get into that, Mr. Lysfjord.

A. Oh.

Q. Anyway, you participated in the supervision of going over those files with the girl and Mr. Hamiel, is that correct? A. Yes, sir.

Q. Now, the question has come up as to just what this compilation—and I am calling your attention to the figure \$87,808.97—that is on the first page, and is explained thereafter. Can you explain what that figure consists of?

Q. It consists of the total that this office girl arrived at in checking all invoices pertaining to acoustical tile.

(Testimony of Elmer Lysfjord.)

Q. Can you state that it is limited to acoustical tile, do you know?

A. To the best of my knowledge, it is. It was instructed to be done that way and when questions would come up in gathering this information, as to what would be included, [535] the girl was instructed only acoustical tile.

Q. Your instructions included to eliminate such things as nails or other items?

Mr. Black: Let the witness state what his instructions were.

Mr. Ackerson: Yes.

The Witness: My instructions were to include only acoustical tile. I had answered in the gathering of this material certain questions as to an invoice pertaining to acoustical tile might contain in its total some acoustical nails that were purchased at this same vendor's establishment. Those were written down at the time and were crossed out and not added in the total.

Q. (By Mr. Ackerson): So that the total of \$87,808.97, can you state, is substantially all acoustical tile?

A. Yes, sir, to the best of my knowledge.

Q. Now, we have this figure on the top of the page, Exhibit 39, of commissions and expected profit, seven months, at \$3,160.00 per month, which equals \$22,120.00.

Can you explain how you arrived at that figure?

A. Yes, sir. We started—Mr. Hamiel and I

(Testimony of Elmer Lysfjord.)

started basing the earnings that I had earned, shall I say, in the past, as \$1,580.00, and basing——

Q. \$1,580.00 what?

A. Per month. And going further along that line, the [536] approximate profit on all acoustical tile jobs is about 30 per cent.

Q. How do you arrive at that conclusion?

A. It has been my experience that that is about what it is. Sometimes it is a little higher, sometimes a little lower, depending on the luck, shall we say, that you have in getting a job done the way you figure it.

Q. But based upon your experience, then, would you say it was 30 per cent? A. Yes, sir.

Q. Proceed.

A. Contained in that 30 per cent are three items. The first 10 per cent would be for an overhead factor, clerical help, things like that, warehouse costs.

The second 10 per cent would be the amount generally paid to a salesman for his efforts.

The third 10 per cent was the company's portion of the 30 per cent.

Q. Profit? A. Profits, yes.

Q. Are you stating that this formula you are using was based upon your experience as a salesman? A. And an owner.

Q. And an owner. Very well. And from that can you proceed and say how you calculated and came to the figure of [537] \$22,120.00 for the first seven months?

(Testimony of Elmer Lysfjord.)

A. Well, I used the \$1,580.00 per month figure again as the amounts of money I had been earning in the past as a salesman.

And in going into my own business I was entitled again to the owner's part of the 30 per cent markup, which would double that figure, or a gross profit of \$3,160.00, as my portion of my efforts.

And using the seven-month period that we are talking about at the present, multiplying those two figures, you come up with \$22,120.00. It is my anticipated earnings——

Mr. Black: Just a moment. I have no objection to laying the foundation as to how this document was prepared. But I think we will have to object when the witness goes beyond that and attempts to, in effect, announce that he has been damaged by such-and-such a figure, when, obviously, it is a highly debatable question whether the item is or is not a proper element of the damage at all.

The Court: Sustained.

Mr. Ackerson: Your Honor, I am—did you sustain it?

The Court: Yes. But if you think I was too quick on the trigger, you may try to talk me out of it.

Mr. Ackerson: I merely meant to state, your Honor, that any allegation, or, I mean, any statement which Mr. Black might properly deem prejudicial to his contentions, I have [538] to agree with, and I know Mr. Black knows this is not intentional,

(Testimony of Elmer Lysfjord.)

but it is a question of how we get this basis in here and avoid that.

I would stipulate that any such statement should be stricken or the jury should be cautioned, even without the court's ruling.

Mr. Black: I suggest that we could limit this interrogation to such items as are not self-explanatory from the exhibit itself, and see where we are after that.

Mr. Ackerson: Well, with the addendum on the memo, there are very few of those items except perhaps the next one. I would welcome any suggestion, if there are any others.

Q. (By Mr. Ackerson): You have the next item here, Mr. Lysfjord, of San Bernardino expense of \$960.00. How did you arrive at that figure?

A. That was gathered from the journal of the records of the aabeta co.

Q. What did it include?

A. Well, the rent on the warehouse in San Bernardino.

Q. For how long a period of time?

A. One year.

Q. You had that building under lease, did you?

A. Yes, sir.

Q. And the rent was how much a month? [539]

A. \$60.00 per month.

Q. You figured twelve months' rent?

A. Yes, sir.

Q. Did you actually pay the twelve months' rent?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. What other item does this \$960.00 figure include?

A. Actual expenses in going into the area and the advertisements in local phone books, and other things of that nature.

Q. Does it include value of time spent by either you or Mr. Waldron?

A. No, sir, only exact amounts of money, out-of-pocket money, let's say.

Q. Does that out-of-pocket money show on your books, or is that estimated?

A. It is on the books.

Q. So that that \$960.00 figure covers the total amount, or is that what you claim your share of the out-of-pocket money is?

A. That is what I claim is my share of it.

Q. So that the actual figure would be \$1,920.00 as shown on the second page of the exhibit?

A. Yes, sir.

Q. Now, you have an item here under the \$87,808.97 item of estimated cost for distributor, based upon 17 per [540] cent overhead per tile.

How did you arrive at this 17 per cent figure that apparently was used there?

A. That is the very minimum amount of markup that we paid in the past, comparing the ability to buy material direct on a carload basis at 10 cents a foot, as against buying the same or similar merchandise at 11.7 cents a foot, which is 17 per cent. That is the minimum. We had at times had to pay as high as 20 and 25 per cent above.

(Testimony of Elmer Lysfjord.)

Q. Did you get those figures from the documents contained in Exhibit 40 for identification?

A. Yes, sir.

Q. Your statement is then that the average minimum markup was not less than 17 per cent?

A. Yes, sir.

Q. On the acoustical tile purchased in the total amount of \$87,808.97?

A. That is correct. [541]

Q. Now, let's get to the next figure.

The next figure I think Mr. Hamiel has straightened out. We will either recalculate that or admit the error, Mr. Black.

Now the last figure on the recapitulation page, the first page, you have the figure of \$10,632.78, at the very bottom of the first page, Mr. Lysfjord. Do you see it? A. Yes, sir.

Q. That figure is what, purports to be what?

A. The difference between what we would have paid for the material that we purchased had we been able to continue buying from Pioneer-Flintkote and what we actually did have to pay for the same material.

Q. That figure purports to be half of that amount, does it not, your share?

A. The way it is written here, it is one-half of the total difference, being chargeable to me.

Q. Now let's go on to the second page of the exhibit, that is, Exhibit 39, Mr. Lysfjord. Your testimony has covered thus far, I take it, the details of the method of computation up to the profit and so

(Testimony of Elmer Lysfjord.)

on. Is there anything on page 3 of that exhibit which you have not explained?

Let's ask the specific question as to how you arrived at the first figure on page 3 of that exhibit, this figure of \$21,600.

A. Well, the approximate cost of a carload of acoustical [542] tile is \$6,000, and the average sales price of that amount of material is \$18,000, that being approximately 30 cents a foot.

Q. How did you arrive at that 30 cents a foot figure?

A. That is an average cost of the installation using that acoustical tile.

Q. Is that based on your experience throughout the years? A. Yes, sir.

Q. Then you get to the base price for the approximate carload price, the approximate installation price, and then how do you—

A. I see. There is a comma out of place. I was trying to understand these figures so I might use the same figures because they do tally with that exception, that approximately—again we are using this 30 per cent as a gross profit on any moneys used as a total sales—and 30 per cent of \$18,000 is \$5,400.

Using that as a basis, one carload per month, which has been our practice, or I should say my practice in the past—

Mr. Black: If the court please, I don't think it is necessary to go into this, either. This is pure speculation on how many cars he might have sold

(Testimony of Elmer Lysfjord.)

this year, next year and the year after, and so forth. It is just a mere matter of arithmetic, and the exhibit speaks for itself.

Mr. Ackerson: I will ask one question—first, I think [543] he has a right——

The Court: You are conceding the objection then?

Mr. Ackerson: No, your Honor.

The Court: The objection then is sustained.

Mr. Ackerson: May I ask just one minute of reconsideration? There is a basis here for that, and I would like to ask the question, the direct question, as to how he arrived at the one carload a month.

The Court: You can ask that and see what happens.

Q. (By Mr. Ackerson): How did you arrive at the basis of one carload a month on this first year, Mr. Lysfjord?

A. Well, I had been doing that for some time past, selling at least one carload a month.

Q. With the Downer Company?

A. Yes, sir.

Q. How did you arrive at the figure of 11½ carloads a month for the second year?

Mr. Black: It is obvious now that that is just based on a great deal of optimism and fervent hope and pure speculation, and for the further reason——

The Court: I think the past history is admissible, but the estimate of what he would have done in the future is not.

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: Your Honor, may I be heard just a moment?

The Court: Yes. [544]

Mr. Ackerson: I have gone into that matter and I might say I have a fragmentary brief at least for your Honor. But I think the cases will show that in the absence of better proof—this goes purely to the weight of evidence—I think we have shown that both these plaintiffs are as expert in the field of sales of acoustical tile as you can become. I think they have a right to express their opinion, and we are offering it as their opinion, based upon their experience as an expert and for no other [545] reason.

The weight of the evidence from then on, I think, as the authorities will show, is for the jury. They may think this is a bad estimate, they may think it is not, but I think we have a right under the cases to give the information for whatever it is worth.

Mr. Black: Well, if the court please, I, of course, have the further objection that this extends beyond the time of filing the complaint, which is basic to all this testimony.

Secondly, we recognize the principle—and I don't believe there is any substantial dispute between us—that there must be the fact of damage proved in a certain category, and once that is done there must be an intelligent basis for calculating from that basic data.

But the cases draw the line when you get into the realm of pure speculation as to how much the wit-

(Testimony of Elmer Lysfjord.)

ness thinks he might have developed his business within a certain period, and how much he is going to make next year or how many cars he is going to sell next year. You might as well try to speculate on how much fish we are going to catch at our next Sierra fishing trip.

It is the same sort of thing. There is no question in the world but what the experience of this witness may be proved as a salesman and his skill more or less demonstrated. You can show his past history. And from there on it becomes a jury question as to what is a proper deduction to be made [546] from that data. I don't believe the witness is entitled to get up on the stand and speculate on what he thinks he is going to do two years after the events we are talking about.

Mr. Ackerson: May I be heard just a moment?

The Court: I think a deduction may be made from past experience or existing commitments but not upon an estimate. But if you want to be heard further, go ahead.

Mr. Ackerson: This is my position as far as the law goes—I have cited in the brief a case on every element and the basis for the cases holdings is this, your Honor: It goes back to the point in the motion picture cases, and many other cases, that where a plaintiff has been deprived by the act complained of, as to the matter of damages, once the fact of damage has been proved—and I don't think there is any doubt about the fact of damages being proved

(Testimony of Elmer Lysfjord.)

for whatever they are worth—then the plaintiff can utilize the best method available at hand.

Now I have cited cases to your Honor where the plaintiff has been permitted to give his best opinion and state the reasons for the normal future expectancy. I am not going to speculate 10 years from now. This is up to date.

He has been able to give his opinion or have other people give the opinion on any element of damage that is not susceptible to mathematical calculation because of the act complained of. Now I sincerely believe that that is the law and I believe [547] the cases I have cited sustain that position.

In fact, it has been applied in many cases, for instance, in your motion picture cases. A theatre is closed down because they couldn't get pictures. They sue three years later, and prove what they would have made in that dark house had it been operating on an equal run with the competing house. Now, how do they prove it? They can do it either by expert testimony and opinion, or they can say, well, we would have made as much money as the competing house.

Now, your Honor, the jury and I and Mr. Black all know that that is not mathematically and technically correct because if both houses had been playing on an equal run and availability the gross of both houses would have been diminished. But when the courts come up to the point of proving damage, they have to have some rule of thumb, and they

(Testimony of Elmer Lysfjord.)

have used it. They accept actually that measure of damage of a comparable house.

Now I say that this measure of damage here is a lot more susceptible to raising the issue, but that is up to the jury, that just goes to the weight of it. We are offering it as this witness' opinion based upon his experience as to what would have happened had he had a competitive price and a competitive line of tile up to the present date. We are not asking your Honor to go into mortality tables. If the jury believes it, it is all right; if the jury doesn't believe it, [548] that is the jury's prerogative. But it goes to the weight of the evidence and I respectfully submit that it is admissible. [549]

Mr. Black: I think it gets clearly into the realm of pure speculation and past the line the court has drawn on that basis.

We have the further objection, obviously, that we did before, that it goes beyond the period of the Complaint completely.

The Court: I will spend the evening with your briefs and the cases cited in the briefs and rule on the question tomorrow.

Mr. Ackerson: Thank you. I realize it is a little bit difficult if it is posed as a novel question. I am awfully sorry it was raised this late.

I had no right to suppose, I suppose, Mr. Black wouldn't raise it, but that happens to be the fact, and I believe I have covered it as briefly as I could in the brief that has been supplied.

(Testimony of Elmer Lysfjord.)

The Court: It is presumed everyone in the court knows the law except the judge.

Mr. Ackerson: I have had judges advise me along that line, to always presume the judge does not know it. I don't follow that.

The Court: I just don't know, so I will do some reading on it between now and tomorrow and find out. I think that is more provident than to carry on and possibly commit error. [550]

Members of the jury, we will take a recess, so far as this case is concerned, until tomorrow at 1:30. The court is recessed until tomorrow at 9:30.

(Whereupon, at 4:25 o'clock p.m., Wednesday, May 11, 1955, an adjournment was taken until Thursday, May 12, 1955, at 1:30 o'clock p.m.) [551]

May 12, 1955—1:30 o'Clock P.M.

The Court: Before we take up the Flintkote matter, I have another matter which I have discussed in chambers with counsel which I think can be disposed of very quickly.

Mr. Ackerson: May we be excused, then, for a few minutes, your Honor?

The Court: Yes; you, Mr. Black, and your clients may be excused.

(Other court matters.)

Mr. Black: Before we proceed, your Honor, we have a few routine corrections in the transcript if the court wishes to do that at this time.

The Court: Yes.

Mr. Black: We find at page 480—do you wish to follow this, Mr. Ackerson?

Mr. Ackerson: Yes, Mr. Black.

Mr. Black: —at line 1, it seems clear that the word “message” should be “method.”

Mr. Ackerson: Yes, I think that is correct.

The Court: Mr. Bailiff, will you get me my copy of the transcript?

Mr. Black: Shall I wait until your Honor’s copy is here?

The Court: Yes.

Mr. Ackerson: While we are waiting, do you have a correction [553] on page 494 also, Mr. Black? On line 17 there is the word “but.” I think it should be “buy” or some other word.

Mr. Black: I am sure that should be buy.

Mr. Ackerson: I believe so.

The Court: What is the one on page 480?

Mr. Black: On line 1 the word “method” should be substituted for “message.”

The Court: Let the record show the word “method” instead of the word “message.”

Mr. Black: I find another on at page 485, line 16. The figure “\$1,541.20” should obviously read “\$6,541.20.”

The Court: The record is corrected to show that that figure should be “\$6,541.20.”

Mr. Black: And your correction at page 494, Mr. Ackerson?

Mr. Ackerson: Line 17, your Honor, the first word there, “but,” I think should be “buy.”

The Court: It will be substituted as "buy."

Mr. Black: I have one at 515 at line 9. The word "your" clearly should read "our."

The Court: The "y" is stricken out to make it read "our."

Mr. Black: On page 523, the 15th line, next to the last word, the word "in" should read "until."

The Court: "Until" is inserted and the "in" is stricken. [554]

Mr. Black: And at page 525, line 4, the figure "52" is an obvious error for "50."

The Court: "52" is stricken and "50" is inserted.

Mr. Black: At page 531, second line, the word "insulation" should read "installation."

The Court: "Insulation" is stricken and "installation" is inserted.

Mr. Black: Those are the only ones I have noted. There may be others, but that is all I have.

The Court: I take it that these are agreeable to you, Mr. Ackerson?

Mr. Ackerson: Yes.

The Court: Any more?

Mr. Ackerson: I have nothing further.

The Court: Having read your briefs and the authorities cited therein I think this case is more comparable to the Frankfort Distillery case than to the motion picture cases.

Mr. Ackerson: May I be heard just a moment on the Frankfort case? I read that for the first time last night. I might inject an idea.

The Court: You are rather behind in your reading, Mr. Ackerson.

Mr. Ackerson: You are right, but I might make a suggestion that might distinguish your Honor's thought. It will be very brief. [555]

The Court: All right.

Mr. Ackerson: As I read the Frankfort case, your Honor, it is impossible to say exactly what the method of dealing in the Frankfort case was. In other words, in your motion picture cases, for instance, you do have this refusal to sell day by day on a certain run, availability or clearance. I don't know—and I don't believe it can be ascertained from the Frankfort case—what the method of procedure in the liquor industry was in that area. I couldn't determine from the opinion the reason for the cut-off, whether it was such as we have here, we won't sell you any more, period, or whether it was, we won't sell you as long as you cut prices.

Now if it were the latter the decision would be entirely consistent with my position in the case because it wasn't a permanent cut-off, it was a cut-off until—I can't state that as a fact; I read the case but I tried to determine from my reading of the case what it was, and I don't find that fact there. I suppose the only thing one could do to determine the issue for certain would be to see the transcript or go into the records of the trial court for the decision itself does not make that clear, your Honor. And if the other construction of the case is plausible, then it makes the Frankfort case line up with the other cases that I have cited, and with the

Brookside case, because in one case you have a permanent, we will not sell you, period, in the [556] other type of case, we will continue to sell you under certain circumstances, and in the Frankfort case the circumstance was that you charge the right price.

As your Honor knows in that type of a case it is often common for the plaintiff to renew his—for instance, in the Frankfort case one element of damage was that he hadn't been able to fulfill orders as they came in for Frankfort whisky. It is possible in that case, your Honor, that he sent in an order to the company every time he got an order he couldn't fill. If that is the case again you did have day to day refusals and a contingent refusal initially.

In this case we don't have that. We have an absolute refusal, we will no longer sell you Flintkote tile, not for any reason but under no circumstances.

I think that is the distinction. I don't know whether that will deflect your Honor's prior opinion, but I thought about it on the way up here and I do think the Frankfort case is the only authority cited that might be applicable, and I think that that might be the distinction in the cases. [557]

The Court: In assessing damages in cases of this kind, we are confronted with the theory of how long a man may just sit back and enjoy the accumulation of damages, without doing something to mitigate.

Is he in a position of an employee, for instance, who has been wilfully discharged and has a duty to mitigate damages by seeking other employment,

or may he simply sit back and assume that he would have made the profit if he had been allowed to continue, and collect it from the responsible parties for the balance of his life?

Mr. Ackerson: What alternative do these plaintiffs have? I mean, I don't think there is anything in the evidence that shows it would have been anything but a futile act to go down from day to day and say, "Sell us."

The Court: Regardless of that, of whether it is a futile act—let's take it that it would be a futile act. They were cut off now and forever. Does that confer on them a right to be paid the money they would have made if they had been allowed to go forward, without requiring them to find some means of making money in business otherwise?

Mr. Ackerson: They have tried to do that. They have utilized that. But, to answer your question directly, your Honor, I know there are cases—I don't have the case in mind, but it is one of those picture show cases, though, which went, I believe, to the Supreme Court. I don't have it. [558] I can't cite you the case, but I can give it to your Honor in the morning, if necessary.

But the court there held that a plaintiff faced with a first-run exhibition problem—I think it might have been the Bigelow case, but I am not positive of that. Either the Bigelow case or one of those first cases.

This plaintiff had a first-run theater, that is, he claimed he had a first-run theater location, accompaniments and everything else. He had to play

fourth run. So he couldn't make a go of it, he didn't think he could make a go of it.

He was refused first run. Anyway, he made his house black. He closed his house up and turned the key.

The Court: Did that entitle him to retire?

Mr. Ackerson: The very question came up, your Honor, and they said he was bound to go ahead and keep the house open.

The court said: "No, he can quit or he can try and operate, sue for the difference, or he can close it up and wait."

Now, in this case of ours, your Honor, we are not even faced with that, because these plaintiffs did even go into other lines. They haven't done well with this acoustical tile line, but they have kept their doors open. They didn't just close up and burn things down, and sit down and say, "We [559] will await a lawsuit."

The Court: I think your procedure is to show what the damage has been between the time of the cutoff and the present time——

Mr. Ackerson: That is correct.

The Court: ——but that they are not entitled to collect any damages here—I am not expressing any opinion, whether they are entitled to collect any under any circumstances. That is going to be a question for the jury.

If the jury finds there was a conspiracy that you claim, and they were damaged, they may have their damages down to the time of trial.

And as to the future, if they have established

these facts, they will have the equitable relief of injunction as against the defendants, to protect them in the occurrence of future damages.

Mr. Black: I believe your Honor said to the time of trial.

The Court: That is right.

Mr. Black: Did you mean the time of the filing of suit?

The Court: I haven't been in a position to grant injunctive relief, so none has been granted.

If there has been damage, they are entitled to all damage which has thus far resulted. And if there has been a trust of the kind that is charged, and it has brought about [560] the results the plaintiffs contend, then it is the duty of a court of equity to say, "Don't do it any more. Stop it now." That will protect the plaintiffs in the future.

Mr. Black: The holding of the Frankfort case, your Honor, was that the damage feature was limited to the net sustained from acts done up to the time of the commencement of the suit.

Mr. Ackerson: We don't know the facts in the Frankfort case. That is the bad part of it. It may be another motion picture case of day-to-day damage. It depends on what the cutoff meant on that case; and it doesn't show.

On the other hand, the rest of the cases Mr. Black cited have been cited by me. I mean there isn't a contrary case unless the Frankfort case is.

The Court: There are few areas of law that have so many variations and so little certainty as these antitrust laws.

This court will hold that if the cause of action has been proved the plaintiffs are entitled to their damages between the time of the inception of that cause of action and the time of trial, but that the jury cannot speculate as to future damages because if the jury finds for the plaintiffs the court will treat that as an advisory verdict or finding of fact and acting in the exercise of its equity powers will restrain the defendants from committing further acts of the [561] same kind in the future.

If I am wrong on that——

Mr. Black: Yes, your Honor.

The Court: If I am wrong on it the gentlemen in the Court of Appeals will correct me. But I have come to that conclusion from reading the cases which have been cited.

We can't say that this case is on all fours with any one of the cited cases.

Mr. Black: Well, I just wanted to point out to your Honor that the very case we are talking about, the Frankfort Distilleries case, which your Honor said this case was analogous to more than the other——

The Court: I said it is more nearly analogous to it than the motion picture cases that Mr. Ackerson was talking about. It is not closely analogous to any of the cases which have been cited. There are little shades of distinction to be made in comparing all of them.

Mr. Black: Your Honor appreciates that the only point in the Connecticut Importing case was the ruling that the damages were limited to those

suffered from acts occurring up to the time of the filing of the complaint.

The Court: Mr. Black, if the result of a defendant's act is to break a man's leg and if the leg is thereafter not usable, is the damage cut off on the day he files the suit or is it cut off at the time he ceases to suffer the impairment? [562]

Mr. Black: Well, that is exactly the point. The broken leg is analogous to the lease of the motion picture house, where the physical property was taken away. That is the very point in this case, your Honor, where it is pointed out:

“Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Fry & Sons v. Cudahy Packing Company*, 243 Fed., 205. Damages which accrue after the suit is brought cannot be recovered in this action unless they are the results of acts done before the suit was commenced.”

The Court: That is true. I am not holding contrary to that. Damages, if any, which are awarded here must be as a direct and proximate result of acts done before the suit was commenced, during the life of the conspiracy.

I am going to cut them off as of the time of trial, because equity can prevent further acts of the same kind occurring in the future.

Mr. Black: But, your Honor, the point is that anything—a complaint, as a matter of generalities, speaks as of the date it is filed. Events occurring be-

tween the time of the filing of the complaint and the time of trial must, if at all, [563] be picked up in a supplemental complaint.

And as this court points out, a refusal to sell is implied in law as a continued series of refusals.

There is no one act that has deprived the plaintiffs of its rights, such as taking away a piece of physical property or breaking his leg. There is an implied refusal to sell day by day as time goes on.

And as this court points out, the Second Circuit, if there is a continued refusal to sell, that is wrongful only if such continued refusal is the result of a continuing conspiracy.

Now, that poses an entirely new set of issues that can be presented by the complaint itself, because such continued refusal is wrongful only if it continues to be actuated by a conspiracy which persists from the time the complaint is filed until the time of the trial. And that is the very point decided by this Frankfort case.

The Court: That is what Mr. Ackerson will have to prove.

Mr. Black: The issues aren't tendered. They can't be tendered by the Complaint in this case, because the Complaint speaks as of the date it was filed.

If there was a conspiracy after the Complaint was filed, that——

The Court: He says it is going on to the end of the world unless the court makes your client stop. Doesn't that [564] plead it is a continuing damage?

Mr. Black: Not at all. Not at all. If the con-

spiracy stopped the day after this Complaint was filed—

The Court: But he says it won't. He says, "It won't stop, Judge, until you and your equity powers issue injunction."

Mr. Black: He hasn't said anything of the kind. The only way he can say that is to say it in his Complaint, and his Complaint can't speak except as of the date it is filed.

The Court: It projects itself into the future. It says, "We have to have equity powers to bring this conspiracy to an end," doesn't it?

Mr. Black: If there is an injunction sought, of course, those issues are to be tried by the court in the absence of a jury. That is implicit in itself.

Damage issues resulting from occurrences after the filing of the complaint can't be covered in this action, except on a new set of issues tendered either by a supplemental complaint, with an answer filed, and a second trial, or if filed timely, up to the time of such a supplemental complaint before the trial, with the proper time for answer of the intendment of those issues.

The continued existence of the conspiracy after the date this Complaint was filed is not an issue in the law side of this trial. [565]

The Court: This is not the day for instructing the jury.

Mr. Black: This is the day for, I thought, ruling on the propriety of evidence.

The Court: One specific question which was placed, which asked what the reason, what the basis

was for particular estimates which he had already given. Since he had been allowed to state the estimate, without objection, I think he may state the reason for it.

You may submit, within reason, bearing in mind I just have two ears and 24 hours a day, any authority and I will read anything that you want to submit upon this question, and try to assimilate it before the day for instructing the jury arrives.

It is my present feeling that they may collect damages, if they make out their case, up to the time of the trial. You may file any authority which shows I am wrong.

I am not going to be bullheaded about it. I will back away from this feeling I have now if you show that I am wrong. But I don't think the Frankfort case does it.

Mr. Black: Well, we will do our best, your Honor, and we will see if we can find anything more in support of this doctrine.

In our submission the Frankfort case is precisely on all fours with this case. [566]

The Court: I think, Mr. Ackerson, it would have done us a lot of good to have had a pretrial hearing on this matter.

Mr. Ackerson: It would, your Honor. This question, however—and I am not criticizing—was not raised until the trial. I knew nothing about it until it was raised in court. I am sure Mr. Black was busy on other matters and perhaps that is the excuse there. But I think we could have simplified this a great deal by a pretrial.

Now in anticipation of perhaps another motion or so, I have prepared a brief here, just a short one. It is anticipatory but I think since Mr. Black has stated he is going to file the motions eventually, that I might as well file it and lodge it with the Court at this time and Mr. Black may have something to—I don't care. You might as well have it now, but I mean for the convenience of the Court I will ask permission to lodge it at this time. It has to do with the motions at the end of the case, your Honor.

The Court: Very well. Let us get on with the evidence.

Mr. Ackerson: Will you resume the stand, Mr. Lysfjord?

ELMER LYSFJORD

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Ackerson:

Q. Mr. Lysfjord, I think we covered yesterday a part [567] of these estimates of damage contained in Exhibit 39. Do you have that exhibit before you?

A. No, sir.

Mr. Ackerson: May I have that, Mr. Clerk?

(The exhibit referred to was passed to counsel.)

(Q. By Mr. Ackerson): I believe you have covered the first segment of page 1 on that, that is,

(Testimony of Elmer Lysfjord.)

the \$22,000 figure. Will you just review that briefly, your basis for that figure of \$22,120?

Mr. Black: Didn't we cover this, Mr. Ackerson?

Mr. Ackerson: I believe we covered that. Let's start down—and I think we covered adequately the figures \$87,000, and so forth. And I think that we will ask permission to change the mechanical error there, the second figure of \$66,503.40, which should be \$75,050.40.

The next figure of \$21,305.57 should be \$12,758.57.

And the final figure on the recap page should be \$6,379.28.

Do you find that correct, Mr. Doty?

Mr. Doty: Yes.

Q. (By Mr. Ackerson): Now turning to the second page will you, Mr. Lysfjord, and as to the figures relating to the San Bernardino expense there—do you have that? A. Yes, sir.

Q. —will you just review those figures briefly, the [568] basis on which you estimate those figures?

Mr. Black: Weren't they covered yesterday too, Mr. Ackerson?

Mr. Ackerson: I am not sure. They will be very brief.

Mr. Doty: Yes, they were.

Mr. Ackerson: I believe they were.

Q. You stated that that consisted of \$60 per month rent for a year, promotional expenses and advertising of \$500, utilities and trucking expense of \$700? A. Yes, sir.

Q. And that the figure \$920 was one-half of that

(Testimony of Elmer Lysfjord.)

amount which was attributable to your personal loss? A. Yes, sir.

Q. And then the figure \$23,080 should be diminished, should it not—

You don't mind this leading, Mr. Black?

—should be diminished by the difference between \$10,632.78 and \$6,379.28 attributable to the mechanical error on the first page?

A. I would say the procedure is correct. The exact amount of money I wouldn't at this time want to say.

Mr. Black: That is obviously the sum of the top figure on that page. It doesn't carry forward from anything.

Mr. Ackerson: We will ask permission to change the figures at the proper time. [569]

Q. Let's go on to this approximate cost of one carload of tile, and so forth. Do you have that, on the second page there, Mr. Lysfjord?

A. Yes, sir.

Q. Will you explain the basis on which you came to your conclusion with respect to that alleged damage of those figures?

Mr. Black: That is objected to as already asked and answered, if the court please.

The Court: Overruled.

Q. (By Mr. Ackerson): Make it as brief as possible, Mr. Lysfjord. I don't know whether it has been asked or not.

Mr. Black: On page 542 of the transcript.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): Will you make it just as brief as possible?

A. One carload of material cost approximately \$6,000, and the average sales price of a carload of material is 30 cents a foot, making a total sale for a carload of material of about \$18,000.

Q. You mean an installed price on the job?

A. Yes, sir.

Q. All right.

A. An installed price. And approximately 30 per cent of that \$18,000 is the gross profit. 30 per cent of \$18,000 [570] is \$5,400.

Q. And that would constitute the gross profit, the expected gross profit, on a carload of tile?

A. That is true.

Q. Now how is the gross profit divided? Did you consider that in arriving at this figure?

A. I don't follow you.

Q. The gross profit, I believe you said, consisted of 30 per cent—

A. Oh, I see. The very basic costs of a job constitute the actual cost of it, the nails, the tile, stripping, labor, the taxes incurred, things like that.

Q. Let's see if we can illustrate that, if we can. Do we have a piece of chalk, Mr. Crier?

(Drawing on blackboard.) [571]

Q. Let's take a heading here and see if you can illustrate this, Mr. Lysfjord. We will entitle it "Gross Cost of a Job." Can we use that figure? "Gross Cost of a Carload of Tile Installed."

(Testimony of Elmer Lysfjord.)

Let's put over in this column the cost of the tile itself, which would be what, approximately?

A. Ten cents a square foot.

Q. What would a carload cost?

A. \$6,000.00.

Q. There is \$6,000.00 (indicating). Now, can you build that up to the installed price, from your experience and from your bidding operations and your knowledge? What do you add to that before it is installed?

A. The labor of actually installing that. The cost of trucking.

Q. All right. Labor and other materials. Trucking.

A. Taxes.

Q. Taxes.

A. Insurances.

Q. Insurance. Anything else? Do you add sales cost to it?

A. No, sir.

Q. All right. Now, that constitutes your material and labor costs then, I take it?

A. That is right. [572]

Q. All right. Now, in bidding a job for the Downer Company or for yourself, did you add anything else to your bid, other than material, labor, insurance, trucking and taxes?

A. A certain amount of supervision. I am sorry. I left that out.

Q. Supervision. That comes on this side, right (indicating)?

A. Right.

Q. All right. Now, do you add any item for profit, or anything else?

(Testimony of Elmer Lysfjord.)

A. To that total you would add a markup of 30 per cent.

Q. To all of this then you would mark up, add the total cost of all these factors and then you would add 30 per cent to that?

A. Approximately so, yes.

Q. All right. And what would that 30 per cent consist of?

A. As far as my company is concerned?

Q. Yes. Or as far as Downer Company. The basis you made these figures on.

A. Ten per cent of that generally goes to the salesman.

Q. All right. Ten per cent sales.

A. Ten per cent to the overhead factor.

Q. Overhead. [573]

A. Ten per cent profit to the company.

Q. Ten per cent profit. Now, when you were working with the Downer Company you participated only in the top figure of ten per cent, didn't you?

A. That is true.

Q. In your own business, would you have any further participation in those percentage figures?

A. I would have the additional ten per cent of the profit for the company.

Q. In other words, the basis here is based upon the fact that you would save the ten per cent sales cost for yourself and as an owner you would get the ten per cent profit?

Mr. Black: That is objected to as leading.

The Court: Sustained.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): Well, state the facts, Mr. Lysfjord.

A. As an owner of my own company I would get the ten per cent as a salesman commission, because I do the selling. I would also get ten per cent for the profit of the company, because I am an owner in the company.

Q. Very well. Then this figure here that we were talking about, under the line on page 2, that, as I understand you, is based on a combined cost of this 30 per cent and your labor and the rest of it, that \$18,000.00 figure?

A. Yes, sir. [574]

Q. That comprises all of this (indicating)?

A. That is true.

Q. What you have stated is merely as an owner of your own business you would expect to make 20 per cent of the \$18,000.00 per car, is that right?

A. That is true.

Q. Now, the bottom part, the last three lines there are merely the results of that type of computation, is that correct?

A. That is true.

Q. Now, you have stated—

Mr. Black: That is objected to, if the Court please. We are talking about the last three lines which involve completely unfounded assumptions that a car a month is going to be sold.

Mr. Ackerson: I am coming to that.

Mr. Black: That is what the last three lines are talking about.

Mr. Ackerson: Strike that question. I will accede to Mr. Black.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): The next succeeding line there reading, "During the first year of business an average of one carload of tile per month——"

Mr. Black: That is objected to on the ground that is assuming a mere speculation as to something projected into [575] the future or the witness' guess or some other basis not supported by anything in the record.

Mr. Ackerson: I haven't asked the question yet.

The Court: What evidence supports it?

Mr. Ackerson: That is what I am trying to ask. The question was going to be, what is your basis for that statement?

Mr. Black: Let's get the witness to make the statement, not read it to him.

The Court: Finish the question then.

Q. (By Mr. Ackerson): What is the basis for your computation of the second line there, beginning with "During the first year of business," and so forth?

A. Because in some time past I had been selling a carload or more, generally more than that a month, for the R. W. Downer Company.

Q. What basis do you have for assuming that you could have done that for yourself? That is the purpose of your statement, isn't it?

A. I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else. I surely would work as hard

(Testimony of Elmer Lysfjord.)

or probably twice as hard for myself as for anybody else.

Q. Would you have had the same contacts for yourself as you had with the Downer [576] Company? A. I most certainly would.

Q. Now, that is the basis for the figure contained in that line. Can you go on and explain that, explain that basis in detail, how you arrived at that figure?

A. You mean the actual figures themselves or how I ascertained the use of a carload per month? Which is the question?

Q. Well, you have this figure of \$64,800.00 there in the second line. I want to know the mathematics or your reasons, the basis, how you arrived at that figure.

A. Well, a carload per month would amount to a sale of \$64,800.00. I broke that down a little further down here, that one-third of that \$64,800.00 would be for an overhead factor of \$21,600.00, a profit of \$21,600.00 again being one-third of this amount.

And profit for myself—incidentally, the first profit would be with Mr. Waldron. We do split the amounts of the total. And the last line being a profit to myself of the same amount of money, being one-third of the anticipated profit for the year.

Q. That is based upon your assumption that you could have continued to sell a carload a month for yourself?

Mr. Black: I move to strike all of this testimony on the ground it is completely unsupported by any-

(Testimony of Elmer Lysfjord.)

thing but the witness' speculation on the [577] subject.

The Court: Denied.

Q. (By Mr. Ackerson): Is that correct?

A. That is correct, sir.

Q. Now, turning the page, Mr. Lysfjord, you have other computations there. Can you explain your basis, the foundation for those figures?

A. Previously I have explained the sum of \$21,600.00. And to carry this forward I feel that in the second year of operation——

Mr. Black: We renew our objection to this line of testimony, if the Court please. It involves a gratuitous speculation to the future, that hasn't been borne out by anything in this record, to distinguish it from a mere guess or speculation or bit of wishful thinking on the part of the plaintiff.

The Court: Overruled. [578]

The Witness: I continued this group of figuring based on the amount of material that I had sold in the past, developing it up to the point of \$21,600, and continuing on that growing basis that I feel that we have shown in the past to get a very moderate increase—I am of the opinion that I think I could do more than this, but using a very minimum of one-half a carload more in the second year, projecting this on in the dollar value to \$32,400, and going into the third year along the same lines that we have been speaking of, to two carloads per month.

Mr. Black: That is objected to on the same grounds, if the Court please.

(Testimony of Elmer Lysfjord.)

The Court: Overruled.

The Witness: Bringing it to a total of \$43,200. It is a continuing adding of these amounts to arrive at that \$43,200, and adding these all together for the 3-year period it would amount to \$97,200, and from our books, the general ledger that was in court yesterday or perhaps today too, there was an actual profit of \$21,411.50.

Now subtracting the actual profit from the buildup that we have gone through here would show a total estimated loss due to the restraint of supply of \$75,788.50.

Q. (By Mr. Ackerson): In other words, after arriving at the total, what you felt was the normal business, the business you should have [579] had, you deducted the actual profits made by your company during this 3-year period?

A. That is true.

Q. And that actual profit from your books was \$21,411.50?

A. That is true.

Q. You deducted that from your prior figures to arrive at the final figure of \$75,788.50?

A. That is correct.

Q. Now I have only one question more, Mr. Lysfjord, and that relates to these exhibits from the Downer file, numbered 19, 20—and will you look at these as we go along—21, 22, 23, 24, 25, 26, 27, 28, and ask you from your experience with the Downer Company or with other companies there is any way in your mind or to your knowledge that the Downer Company could have submitted an

(Testimony of Elmer Lysfjord.)

actual bid or a bona fide bid other than tying it onto the other figures, the Shugart figures and the Coast figures and the Howard figures.

Mr. Black: That is objected to as calling for a conclusion of the witness.

Mr. Ackerson: He is an expert on this. If there is any explanation it can be rebutted.

The Court: Overruled.

The Witness: It would be impossible to do so. [580]

Q. (By Mr. Ackerson): In other words, those bids of the Downer Company had to be tied up with the others?

Mr. Black: Objected to as leading.

The Court: Sustained.

Mr. Ackerson: Very well. That is all.

You may cross-examine.

Mr. Black: May I have Plaintiffs' Exhibit No. 9?

(The exhibit referred to was passed to counsel.)

Cross-Examination

By Mr. Black:

Q. Mr. Lysfjord, do you recall giving a deposition in this case on September 19, 1952, continuing to October 7 and October 8, 1952?

A. I recall a deposition in that period. I don't recall if those are the exact dates.

Q. You did so testify to a deposition, however, at or about that time? A. Yes, sir.

Q. Now referring to the meeting which you have

(Testimony of Elmer Lysfjord.)

testified to occurring at your office on Atlantic Boulevard, you have testified, Mr. Lysfjord, that Mr. Thompson, Mr. Baymiller and Mr. Ragland were present, at which time you were told by the Flintkote people that they would no longer continue to sell you tile? Do you recall your testimony in connection [581] with that meeting at the trial?

A. I recall giving it.

Q. I now refer you to the deposition given earlier in this case on October 7, 1952, and to page 223 of that deposition, and I will ask you if you recall this testimony:

“Q. I see. Now, you claim, I believe, that your arrangement for a supply from Flintkote was terminated, or it did terminate?

“A. I claim that, yes.

“Q. When did that occur?

“A. To the best of my knowledge in April.

“Q. What were the circumstances?

“A. Mr. Thompson, Mr. Baymiller, and Mr. Ragland came to my office.

“Q. About when?

“A. About that date, I imagine. March, somewhere in March, and—I mean—I don't recall.

“Q. March or April?

“A. March or April, right.

“Q. And who else was there besides those gentlemen and you? A. Mr. Waldron.

“Q. Mr. Waldron. The five of you present?

“A. Right.

(Testimony of Elmer Lysfjord.)

“Q. And what was said by anybody [582] present?

“A. Mr. Thompson said that they were no longer going to sell us tile.

“Q. That is all that was said?

“A. There was a great deal more, but I can't recall it, because I became angry with the fact they weren't going to sell us tile.

“Q. Nobody asked him why?

“A. Certainly I asked him why.

“Q. What was said at that time?

“A. They felt they didn't want to sell us any more tile. It wasn't a great deal of explanation to it. He just said, 'We're not going to sell you tile, so what?' Of course, he didn't say, 'So what,' that's my inference at what he meant.

“Q. About how long were they there at that time in your office?

“A. A very short time, 10 minutes at the most.

“Q. Was Mr. Thompson the only one of the Flintkote group that said anything?

“A. Well, Mr. Baymiller said that he was very sorry it happened, and as I recall he said it was entirely out of their hands, they were told they couldn't sell tile to us.

“Q. Did he say who told him?

“A. No. He, as I recall, now—this is only [583] from memory—something along the lines of, 'You understand, we're only employees, we don't own the company.' Anything further than that I couldn't tell you.

(Testimony of Elmer Lysfjord.)

“Q. Let me say this, Mr. Lysfjord: I take it from your complaint that the termination of your supply of Flintkote, from Flintkote, your ability to get tile from Flintkote, is one of the important claims which you make as part of your lawsuit, and I am now asking you to give me, to the best of your recollection, everything that was said on this occasion of their apparently first informing you that you, a beta company, would no longer be able to get tile from Flintkote.

“A. I have already answered that.

“Q. To the best of your ability you have given me everything that you can recall was said at that time by anybody present? A. That’s correct.

“Q. All right. Did Mr. Waldron say anything that you can recall?

“A. I don’t remember what Mr. Waldron said.”

Then on page 320 of the deposition——

Mr. Ackerson: Mr. Black, are you going to ask a question about this or are you just reading the deposition? I mean, [584] the witness is here.

Mr. Black: Page 319, Mr. Ackerson and Mr. Lysfjord, line 15:

“A. I think I answered that question once before, and I have recalled, over the evening, a couple of more things that were said in this particular conversation, but probably the reason I didn’t remember it, that I was so angry at the time that I don’t think that I spoke very civil to them at that time. It was a very basic statement on their part. They came in and said very definitely, ‘You are no

(Testimony of Elmer Lysfjord.)

longer going to have any tile supplied to you by the Flintkote Company.'

"Q. What were the additional things you recalled over the evening?

"A. Well, again, it's just searching my memory in the thing, but it's somewhat like, 'We decided we don't like the fact that you have an office on Atlantic.' I said, 'What's the matter with an office on Atlantic?' They said, 'Why couldn't you use your home?' I said, 'When I got the franchise from you at no time did you attempt to tell me how to run my business, now you're going to try to tell me how to run my business,' and the exact words I might remember in another few days, but at the time I was so angry—I'm an excitable [585] person, incidentally. I keep my temper to about 95 to 100 per cent of the time, but that last digit sometimes makes me pretty angry, and that particular thing did, because I was more or less aware of the development of this for some weeks, as your deposition will show, questioning along the line. As a matter of fact, as I recall, I think—I'm just saying I think—that I escorted Mr. Thompson out of the door and said, 'Get out of my office, I don't want to talk to you any more.' "

Do you recall giving that testimony?

A. Evidently. You just read it. [586]

Q. Did you escort Mr. Thompson to the door on that occasion and tell him to get out, you didn't want to talk to him any more?

(Testimony of Elmer Lysfjord.)

A. It is what I would have liked to have done, not what I did do.

Q. Why did you say you did do it then?

A. I have no reason to say.

Q. You were under oath at the time, weren't you?

A. Well, that is rather difficult for me to explain that to you. I think I was telling—I don't say I think—I was telling you what I felt like I was going to do.

Q. I beg your pardon?

A. I was telling what I wanted to do, not what I did do.

Q. Mr. Lysfjord, isn't it the fact that after you thought that question over that evening you decided that you ought to be angry about this thing and you decided that you would announce you were angry and therefore you threw him out of the office? Isn't that the plain fact?

A. Are you telling me what I thought?

Q. Yes.

A. How can you tell me what I thought?

Q. Because you just said you testified to something that didn't happen, because it was something you said you should have done, but you didn't. [587]

A. Those words intimate that perhaps. I am telling you that is what I wanted to do, not what I did do.

Q. You just told me you had testified you did do it, and it didn't happen——

A. Mr. Black, I am telling you exactly what——

(Testimony of Elmer Lysfjord.)

I am trying to the best of my knowledge to answer your question. You keep telling me things I didn't say. Why do you say that?

Q. It didn't happen, did it?

A. Escorting him out of the office?

Q. Yes. A. No, sir.

Q. Yet you gave that testimony, you gave the testimony, didn't you, at the deposition?

A. It evidently sounds like it, from what you read.

Q. You don't deny it, do you?

A. I don't deny what?

Q. You gave the testimony I have just read.

A. I was there, yes, sir.

Q. I now refer you, Mr. Lysfjord, to this University of California document, referring to the Santa Barbara College work, Plaintiff's Exhibit No. 9, and I ask you to look at that document.

A. (Witness complies.)

Q. Now, I believe you testified at the trial that you recall receiving that document at the Los Angeles office. [588] A. That is correct.

Q. Now, I refer you to your earlier deposition, page 72, line 22:

“Q. Now, did you or the aabeta company, during '51 or early '52, at the time the aabeta company was starting business, receive any other correspondence, letters or memoranda or documents from the Pioneer-Flintkote Company?

“A. That one you have right there.

(Testimony of Elmer Lysfjord.)

“Q. This says it is not an order. What do you call it?”

“A. That is a request by the University of Southern California to have a bid offered to them—University of California—for a bid to do work for them, and that was sent to the Flintkote people. They in turn forwarded it to us as a contractor to bid on the job, and if we can do the job.”

Then there is discussion off the record and then the document is identified as a document bearing date January 16, 1952.

That is the date of that document, is it not?

A. That is true.

Q. “* * * and the number above the date—it is either a ‘3’ or ‘5’ B, like Baker, 6639, and in the upper left-hand corner, University of California Purchasing [589] Department as addressor, and the addressee is the Pioneer-Flintkote Company.

“We will mark as the same defendant’s exhibit, only No. 2 for identification.”

That was referring to that very document, was it not, Mr. Lysfjord?

A. Well, you are reading the very same things that are on this document. I can’t remember if it is the identical one.

Q. You don’t recall any other document similar to that, do you, that has been in this case?

A. No, sir.

Q. Now, returning to page 76 of the deposition, the question appears:

“Q. Do you know at what office of the aabeta

(Testimony of Elmer Lysfjord.)

company, of the two you named, this Defendant's Exhibit 2 for identification was received?

"A. I don't know; I don't remember.

"Mr. Ackerson: I did not understand that question.

"The Witness: Which office that was received.

"Mr. Scully: He gave two addresses as their place of business. He said that previously the aabeta company received this letter and I asked which of the two addresses the letter was [590] received.

"Mr. Ackerson: Oh, I see.

"The Witness: And I don't remember."

Now, what has refreshed your recollection—pardon me. Did you give that testimony?

A. Again I just have to say evidently, you are reading a deposition. I can't remember the exact words following right along with you there.

Q. What has refreshed your recollection since the time you gave that deposition so you now remember receiving this at the Los Angeles office?

A. Well, I did receive it, which I said. And I have never ever received anything at the San Bernardino office, because I was never there at any time, other than a visit. So it could be only one other place and that is on Atlantic Avenue.

Q. At that time you didn't remember?

A. Evidently not.

Q. Therefore, you didn't have any recollection at that time as to how that document came to your

(Testimony of Elmer Lysfjord.)

hands, whether directly or whether you opened it yourself or what?

A. You evidently stated that just now, didn't you?

Q. Now, I am referring at the moment to these various documents, so-called takeoff sheets, Mr. Lysfjord.

I wish you would tell me again just what was your duty in connection with your work at the Downer Company that [591] required you to check and examine these documents.

A. My duty there was to bid work, to attempt to get this work for myself and the Downer Company.

The method of doing so was to take sheets of these or other sheets and compile figures or get figures. In this particular case the figures given to me, and bid these jobs and make an attempt to, as I said before, acquire these jobs for the Downer Company and myself.

Q. In what condition were those sheets given to you when you received them, blank or did they have an entry on them?

A. They were given to me exactly the way you see them, with the exception that some of these I had in my possession and Mr. Arnett asked me for them, and in my presence would write certain figures on these sheets and hand them back to me and say, "That is the figure you are going to bid."

Q. Did you prepare the bid in every case on those documents?

(Testimony of Elmer Lysfjord.)

A. On these documents (indicating)?

Q. Yes. A. I never did.

Q. I am frankly puzzled as to what your function was supposed to be with the documents.

A. To bid the jobs and try to get them for the Downer Company. [592]

Q. But, as I understand you, you received them in the same condition they are now in with the bid complete on them.

A. That is true, complete. You mean the figure complete?

Q. Yes. Then you tell me you did not prepare the bids, is that right?

A. Well, it all depends on what you mean by "prepare the bids." Did I make a takeoff on them? What are you referring to?

Q. I am trying to find out what it is they wanted you to do with those particular documents.

A. I just told you I bid them on the phone to general contractors and would try to obtain the job for myself and for the Downer Company.

Q. Did you in every instance telephone somebody and repeat the figure that appears on the written part of that bid on those documents?

A. Certain portions of these, yes. The other portion was handled by Mr. Waldron.

Q. You were expressly instructed, were you, by somebody in the company, to bid that precise figure in each instance? A. That is true.

Q. Why was that done by you rather than by somebody [593] else in the organization? What pur-

(Testimony of Elmer Lysfjord.)

pose did it serve to the company to have you do that? I am trying to find out what official function you had with respect to going through this operation.

A. Just my very job of bidding jobs at all times, these and others. These happen to be just a few of all the jobs that I did bid. I bid very many of them.

Q. But, as I understand your testimony, you were told what figure you had to bid?

A. That is true.

Q. You weren't given any discretion on that matter as to figuring costs or anything else?

A. None whatsoever.

Q. Was there any reason you can think of why they asked you to do that, rather than some girl in the office, to telephone or do it themselves, or what was the reason for asking you to do it?

A. Mostly because general contractors won't accept a bid from a girl. It has to be the salesman that calls on a general area. These examples are contractors—or jobs to be bid to contractors that were in my area, my territory; people that I was acquainted with. [594]

Q. And in every instance did Mr. Arnett or somebody in the company specifically ask you to call somebody and did this particular job, job by job?

A. Yes, sir.

Q. Or were you just given the thing in a sort of a blanket instruction to take care of?

A. I don't just understand you.

(Testimony of Elmer Lysfjord.)

Q. Were you given a whole batch of these things at one time, for example, and told to work on them, or were you specifically told in each instance to bid the precise sum that appears on the documents?

A. In each instance.

Q. You don't have any idea who it was in the organization that obtained the information that appears on the documents as to the figure presumably to be bid by some other contractor?

A. Yes, sir, I do.

Q. What information do you have on that score?

A. Being present listening to conversations between Mr. Arnett and sundry people on the phone; also in the general office area where Mr. Griswold, at that time an estimator, and Mr. Tony Wellman, also an estimator, would contact these other people, get the information, write it on the back of the sheets, and the sheet was presented to me to bid in my presence. And at occasions I was called back by general contractors to [595] explain a certain figure. The reason that they would call me is that they were my general contractors. By that I mean the people in my area. And the estimator would have to find me somewhere in my territory and have me come back into the office with the take-off sheets to see if we could answer this contractor's inquiry.

Q. Would that be the general or the sub that would be calling you, or both?

A. The general. We were the subcontractors.

Q. Now this series of documents is confined, is it not, to public jobs?

(Testimony of Elmer Lysfjord.)

A. I would say so, yes.

Q. Without exception in those documents, that is true, is it?

A. In any case in these documents, yes, sir.

Q. And in your experience in that work, how many bids are required in order to bid a public job, do you know?

A. How many bids from whom?

Q. They have to have several bids, do they not?

A. No, sir.

Q. Are public jobs permitted on a single bid?

A. They are to the general. The general contractor bids the job. The subcontractor bids to the general. He can take one or 20 if he wants.

Q. Did you ever know of a public job that was based on [596] a single bid with no other bid?

A. Yes, sir.

Mr. Ackerson: I don't mean to interrupt, Mr. Black, but do you mean the bid of a general contractor or a subcontractor?

Mr. Black: I mean at the subcontractor level.

Q. Does that happen very often?

A. Oh, not too often, but it is quite possible.

Q. Isn't it the fact that occasionally when a contractor is employed or too busy to work on a job he will submit a purposely high bid to enable the successful contractor simply to say that there has been more than one bid? Have you ever heard of that being done?

A. It would be kind of a foolish gesture. I mean,

(Testimony of Elmer Lysfjord.)

all of us are real busy to try to keep up our work. I don't think that that would be so.

Q. Have you ever heard of what they call a courtesy bid?

A. Yes, sir, I have heard of that.

Q. That is the purpose of that, is it not, to give somebody an opportunity to say there has been more than one bid on this job and asks another person to put in a bid?

A. No, sir, I would say it was rather, that you take this job and I will take the next one.

Q. Well, now, in the Downer organization, do you know of your own knowledge what the motive was in doing this [597] operation that you are speaking of?

A. Yes, sir.

Q. How do you know that?

A. Conversations that I was present at, the general experience that I have had in this field over past years to know exactly what the idea of it was.

Q. Are you able to state that in every instance the Downer Company was not simply filing what they might call a courtesy bid as an accommodation to another contractor to enable him to have a low bid where the Downer Company didn't intend to do the work at all?

A. In every instance? Referring to what?

Q. No, I am talking about the take-off sheets. Maybe I didn't make my question clear. I will repeat it.

Are you able to state from your own knowledge

(Testimony of Elmer Lysfjord.)

that there are not some instances among these documents wherein the Downer Company simply was trying to accommodate another contractor in a situation where they couldn't have bid on the job anyway because they were too busy, by putting in a bid that was higher?

A. I most certainly do, because these take-offs represent an area that I was working in and it was up to me to decide whether we wanted to bid the job or not.

Q. You had no discretion in the matter on these jobs, as I understand it. [598]

A. The very fact that I had to bid a certain figure, yes, sir, but whether I wanted to bid the job or not was up to me.

Q. You knew you wouldn't get the job, didn't you, in each case you were instructed to bid a figure that was higher?

A. At a later date I did but not to begin with. I wasn't aware of the fact when they first started, as to what the reason was. But I surely found out soon enough because it affected my income.

Q. How long did this sort of thing keep up?

A. What sort of thing?

Q. This practice of, as you testified, passing the jobs around to various subcontractors?

A. At least until the time I left the Downer Company.

Q. Do you know of anything after that date?

A. Well, I have just learned a little lesson in court, that you can't surmise anything. I was well

(Testimony of Elmer Lysfjord.)

aware of it from conversations, if that is what you want me to say, but if you want me to say definitely, no, sir.

Q. I call your attention, Mr. Lysfjord, to your deposition at page 259, line 23, where you were asked this question:

“Q. Do you claim that following that period of price drop”—(talking about a period of lower prices)—“that it went up again?”

“A. Never went up. [599]”

“Q. Never went up? A. No.

“Q. Is it today low?”

“A. Very low; very low.

“Q. Based on your knowledge of the local industry in acoustical tile, and the competition in the field around here in that business, what do you attribute that to, that is, I mean, the continued low level of the price? Competition?”

“A. My opinion?”

“Q. Yes.”

“A. My opinion is the fact they are no longer getting together on the jobs.”

Do you remember giving that testimony?

I believe so; yes, sir.

Q. What was the basis of that statement?

A. Well, the amount of money that a particular job was going for at that time.

Q. Now, following the termination of your relations with The Flintkote Company, Mr. Lysfjord, how busy were you immediately following that date? A. What do you mean by busy?

(Testimony of Elmer Lysfjord.)

Q. In your activity as an acoustical tile contractor.

A. Comparing it to what, though? I have got to compare it with something. Busy in my mind and yours might be [600] two different things.

Q. Were you operating to the full extent of your capacity immediately following your termination, let's say?

A. Only to the extent of the use of the Flintkote tile that we had.

Q. How long did it take you to use that tile up?

A. I hesitate to guess exactly how long.

Q. We learned yesterday it wasn't used up by the first six months of 1952.

A. Well, then, you have answered the question.

Q. How long after you had—by that time you had installed only \$4,000 worth of tile or thereabouts—how long, if you recall, did it take you to use up the rest of the Flintkote tile?

A. I wouldn't venture a guess. You can look into the files—they are there—and look at it.

Q. You don't have any opinion on that at all or any recollection of it?

A. I have no opinion at this time.

Q. I call your attention to the deposition, Mr. Lysfjord, at page 80, line 24:

“Q. At that time, May or June of '52, did you say you had more business than you could handle?

“A. May or June?

“Q. Of '52? [601] A. That's right.

“Q. And how long did that condition in aabeta

(Testimony of Elmer Lysfjord.)

exist, that you had more business than you could handle?

“A. Just that long. You probably realize we had to get trucks, scaffolding, and men to do the job and to perform service that we were supposed to do. At that time we didn’t have the men or the equipment to be able to perform at the time we had the tile.

“Q. That was May or June of ’52?

“A. That’s right, right about then.

“Q. Then, I take it, you had not completed aabeta’s organization until about that time; is that right?

“A. That’s right. The company actually did not go into operation or even install a job for three months after the first of the year, or thereabouts.

“Q. After the first of 1952?

“A. That’s right.”

Do you recall giving that testimony?

A. Yes, sir. [602]

Q. Does that refresh your recollection somewhat as to how soon it was you were able to actually use the tile you had on hand at the time of the termination?

A. Mr. Black, if you want to find out exactly, I can go to my records. If you want me to guess, I just won’t do it, or I can’t do it.

Q. If you tell me you can’t do it——

A. I can’t do it.

Q. That is rather a different thing from telling me you won’t do it. The court has a right to protect

(Testimony of Elmer Lysfjord.)

you from any improper question. I don't want to propose to you——

A. I meant I didn't want to guess. Let's put it that way.

Q. When you first talked to Mr. Ragland, Mr. Lysfjord, in connection with the establishment of a line of tile, as I understand it, his first statement, in effect, was that he would check with his people and would find out what the situation was?

A. Yes.

Q. And didn't he tell you in one of the earlier statements, when it was still in an indefinite state, as to what your position would be, in one of your conversations that there was no opportunity to get into the Los Angeles area at all?

A. No, sir. [603]

Q. Do you recall his suggesting that there might be an opportunity in Phoenix or Albuquerque or Denver?

A. Yes, sir, I recall that.

Q. What was the occasion then, if you know, for his suggesting places that far away? Did he give any explanation of that?

A. I don't remember he did.

Q. You wouldn't have been interested in trying to cover Denver and Los Angeles at the same time, would you?

A. I had no intentions of working anywhere than in Los Angeles.

Q. Along the same line, at the first Manhattan Supper Club luncheon when Mr. Baymiller and Mr. Ragland and yourself were present, do you not re-

(Testimony of Elmer Lysfjord.)

call Mr. Baymiller at that time stating flatly that the company was already adequately represented in the Los Angeles area and there was no opportunity available here?

A. If he had said that, there would have been no reason for any future meetings.

Q. I am asking you a question. Give me an answer of yes or no to the question. A. No.

Q. Do you recall at the second Manhattan Supper Club meeting that Mr. Thompson said, "There will be an opportunity for you in San Bernardino and Riverside, but the Los Angeles [604] territory will not be available to you"? A. No, sir.

Q. Do you recall his stating on that occasion, in answer to your inquiry, whether you wouldn't be permitted to take jobs in Los Angeles, with respect to certain contractors that you felt you could get business from, when nobody else could, do you recall Mr. Thompson stating, in answer to that question, "Well, any such matters will have to be considered as they come up, on their merits"?

A. No, sir.

Mr. Ackerson: That question is complex. I mean you have asked two questions, Mr. Black. Do you want a negative answer to both of them?

Mr. Black: I think the witness understood me. I wanted to give the full background so he would understand what I was talking about.

Q. (By Mr. Black): Do you recall any such statement from Mr. Thompson? A. No, sir.

Q. Do you recall at the meeting later, when Mr.

(Testimony of Elmer Lysfjord.)

Harkins interviewed you and Mr. Waldron, that Mr. Harkins put the question to you, "Now, are you people sure that you will have enough business in the San Bernardino-Riverside area to keep you going"?

A. No, sir, I do not. [605]

Q. Mr. Lysfjord, there has been some testimony in the case about a warehouse down somewhere near the Los Angeles River. Did you have anything to do with the acquisition of such a place?

A. I believe I did, yes, sir.

Q. When was that acquired?

A. In the early part of our operation.

Q. Was it acquired by the aabeta co.?

A. By the aabeta co., yes, sir.

Q. Did you do any business there?

A. We attempted, rather, it was our intention to use that as a supplementary storage house for our anticipated car from Pioneer-Flintkote, which, incidentally, we never received.

Q. Now, I invite your attention to your deposition given September, 1952, to page 121, line 19:

"Q. What places of business did the aabeta company have at any time during the year 1952?

"A. 7302 South Atlantic, Bell.

"Q. When was that opened?

"A. It was in February.

"Q. Of '52? A. Yes.

"Q. Is that under lease?

"A. That's right. [606]

"Q. Do you have that lease, or a copy of it?

(Testimony of Elmer Lysfjord.)

“A. I did have, but don’t have it with me. I evidently didn’t bring it with me.”

Then going on, talking about the lease, which at the moment we are not interested in:

“Q. Give me all the addresses of all the places of business that the aabeta company had in 1952.

“A. You have 7302—you have the 7302 Atlantic address. 901 North Waterman, San Bernardino.

“Q. Any others? A. That is all.

“Q. Was the Waterman in San Bernardino leased as well? A. That’s right.”

Do you recall giving that testimony?

A. Yes, sir.

Q. Why wasn’t this warehouse on the river mentioned at that time, if you know?

A. I was referring to our two separate addresses of Los Angeles and in San Bernardino. I didn’t think there was any particular distinction of how many places that we stored material. I didn’t understand that to be the question.

Q. You didn’t understand that to be a [607] place of business?

A. I didn’t understand that as being an answer to the question that was asked.

The Court: We will recess.

(Short recess taken.) [608]

The Court: Proceed.

Q. (By Mr. Black): Mr. Lysfjord, at the time you were negotiating for the Flintkote line and the time that you started establishing yourselves as

(Testimony of Elmer Lysfjord.)

Flintkote dealers, did The Flintkote Company have a complete line of acoustical tile?

A. What do you mean by a complete line?

Q. Well, isn't it the fact that in certain buildings you have to have a non-combustible tile in order to comply with specifications?

A. Occasionally.

Q. Did The Flintkote Company have a non-combustible tile? A. Not to my knowledge.

Q. During that period they didn't?

A. Not to my knowledge.

Q. So that if you had work of that kind to do you would have to go to another supplier in any event to get that tile, would you not?

A. We wouldn't have work like that because I wouldn't bid on a job with that material.

Q. Did you ever install any non-combustible tile in your operations with the aabeta company?

A. Up until what time?

Q. At any time. [609]

A. At any time? Yes, sir, I did.

Q. Where did you acquire that tile?

A. At various places.

Q. Now in your discussions with the Flintkote people, do you recall at any time any mention made that you would or would not carry other lines of tile than the Flintkote tile?

A. Whether or not we would or would not?

Q. Yes. Do you recall that subject coming up in discussing your relations with any of the Flintkote people, the subject of whether you would handle

(Testimony of Elmer Lysfjord.)

lines of tile other than Flintkote or Flintkote entirely?

A. We were trying very hard just to get one, we weren't worrying about others.

Q. My question was, Mr. Lysfjord—if you don't understand me, don't hesitate to ask me—do you recall any discussions at which you were present with the Flintkote people at which the subject of whether you would handle Flintkote tile exclusively or other people's tile in addition to Flintkote was mentioned?

A. No, sir, I don't recall anything like that.

Q. There was no discussion at any time that you know of? A. No, sir.

Q. Nothing specifically apparently was said by the Flintkote people that, we are glad you are the only dealer handling nothing but Flintkote tile, or something of that sort? [610]

A. Now you brought something back to my mind, that they did say something like that. But I wasn't connecting it up with the question that you asked.

Q. When was that said?

A. At one of those meetings.

Q. How do you happen to remember that?

A. You just told me and I recalled.

Q. Did you answer yes because you thought it would benefit you if I just told you, or do you really remember it?

A. I really remember it.

The Court. Just what do you remember?

The Witness: That Mr. Thompson mentioned that they were happy to have an outlet that was

(Testimony of Elmer Lysfjord.)

handling exclusively—of course I don't recall if they used the word "exclusively"—but at least the only line of Flintkote tile. [611]

Q. Well now, let me call your attention to your deposition, Mr. Lysfjord, given in September, page 60, line 20:

“Q. Was anything at all mentioned about an exclusive or nonexclusive operation of yours as to Flintkote? A. No.

“Q. In any of these conversations did you discuss or did they discuss whether or not your new business would possibly handle other makes of acoustical tile at the same time, along with Flintkote?

“A. I don't remember anything like that being mentioned.”

Did you give that answer?

A. Probably so, but I would have remembered it if it had been mentioned like you just did now.

Q. That was back in September of '52. Are you able to explain why the fact I mentioned it to you suddenly brought it to mind and you couldn't remember it at that early date?

A. Mr. Black, how am I going to explain my memory? I don't understand it myself. I either remember it or I don't.

Q. Where was your home at the time that you were [612] working for the Downer Company toward the end of your relationship with the Downer Company?

(Testimony of Elmer Lysfjord.)

A. Well, it was either in Lynwood or in Huntington Park.

Q. Do you recall?

A. It was in Huntington Park. I had moved very recently at that particular time.

Q. Are you able to fix that date, when you moved?

A. When I moved?

Q. Yes.

A. Approximately the end of '50. I would say somewhere in through there, '51.

Q. That was to Huntington Park?

A. I can check it if you want to know exactly.

Q. If you know. I am not trying to pin you down to an exact date, but do you recall where you were living at the time that you were contemplating going to Flintkote and terminating with Downer?

A. It is my recollection it is Huntington Park.

Q. How far from the Downer plant is that address, approximately?

A. Ten, fifteen miles.

Q. How often did you go to the Downer office when you were working for Downer, during that period, just on an average? [613]

A. Probably a couple of times a week.

Q. No oftener than that?

A. It would vary. I might be in there every day of the week. I might not be in there for a whole week, depending on the reasons I had to go in there.

Q. Now, your position with Downer was that of a salesman on commissions?

A. That is true.

(Testimony of Elmer Lysfjord.)

Q. And you regarded yourself as being employed by the Downer Company? A. No, sir.

Q. Well, what relationship did you think you had with the Downer Company?

A. That I acquired work and that we would do the job together, of which I was to share a certain amount on the profits.

Q. The income tax returns that you filed show that they withheld income from you as an employee, did they not? A. I imagine it does.

Q. You had no other source of income during the year 1951 than your commissions from Downer?

A. No, sir.

Q. Did you consider yourself free to go and take a job for Coast or for Hoppe or for any other company during this period, if you saw fit, at your pleasure at any time? [614]

A. I won't say that I would take a job and give it to any one of the other companies, because it wouldn't be to my benefit, but if I so chose I probably could.

Q. You felt no obligation at all to give all your work to the Downer Company?

A. I felt an obligation to make money for myself.

Q. For yourself only?

A. That is the only reason I got the work; not to benefit the Downer Company. [615]

Q. What date, if you remember, was it that you terminated your relations with the Downer people?

(Testimony of Elmer Lysfjord.)

A. You mean actually left working for them at all?

Q. Yes.

A. Or when I told them I was going to leave? Which are you referring to?

Q. I am referring to the actual termination.

A. I figure the end of January. However, there is no very definite date of severance in the sales business. You would have to follow up some of the jobs that you have already contacted in the past and perform the service that you originally started to do. You just can't chop a day off. I mean, I don't work from 8:00 to 4:30 in the sense that after 4:30 you no longer work for them.

Q. What did you do day by day in your work with the Downer Company? What was the nature of your work generally?

A. I would call on general contractors and take off plans that they may have and compute costs and big work, attempt to follow that work to see if I were successful or able to convince the people that they ought to let me do the work.

Q. Speaking generally, did you work every day, every working day in the week?

A. Oh, I probably did some work every day.

Q. And was that true right up to the time that you left their employ? [616]

A. Are you referring to my working in connection with the Downer Company?

Q. Yes.

A. Yes, sir, I did.

(Testimony of Elmer Lysfjord.)

Q. So it was substantially all of your business time that was devoted to that job, wasn't it?

A. Not necessarily so.

Q. What would be the exceptions? What would you be doing on times when you were not devoting all your business time to the Downer Company?

A. At one time I was learning how to be an estimator for the general contracting.

Q. And what period did that take?

A. Off and on through all the period that I was there.

Q. Would that be true of the period during the negotiations with Flintkote?

A. Possibly so.

Q. Are you able to state definitely one way or the other?

A. No, I couldn't say definitely.

Q. Did you tell the Downer people that you were making a connection with Flintkote?

A. No, sir.

Q. What did you tell them when you left their relationship? [617]

A. I told them I was going to leave, I didn't want to be associated with them any more.

Q. Did you explain why?

A. I don't believe I did to begin with. However, I was asked many questions of it.

Q. Did you tell them you were going to go into business for yourself?

A. Eventually I did; yes, after answering the questions that were put to me.

(Testimony of Elmer Lysfjord.)

Q. What was said by him?

A. By whom?

Q. By Mr. Arnett. I presume you talked to Mr. Arnett?

A. I talked to many people there.

Q. I mean to say, he was in charge of the office, wasn't he?

A. Well, there were two people in charge, Mr. Roy Downer and Mr. Arnett. If you are asking a question whether I talked to Mr. Arnett or not, I did, yes. [618]

Q. With whom did you have your discussion about going into business by yourself?

A. Both Mr. Arnett and Mr. Roy Downer.

Q. What did you say to them and what did they say to you?

A. It was mostly what they said to me. They were trying to discourage me from going into business. They said it was a very difficult thing, that I had a good job there and that they offered me a guarantee of \$15,000 a year to stay with them, and a larger territory.

Q. Well, now, you think it was January that you actually left the Downer people?

A. I think it was somewhere around January.

Q. I refer to your deposition at page 64, line 14:

“Q. You told them when you left. When did you leave the Downer Company, about June of 19——

A. Oh, no. February.

Q. February. About the end of February, you said, of 1952, I think.

“A. Something like that.

(Testimony of Elmer Lysfjord.)

“Q. What did you say about that subject of having contacted or made arrangements with Flintkote, that is, in the Downer Company, who did you talk to and what did you say?”

“A. I just said I was leaving. [619]

“Q. Did you say anything about Flintkote?”

“A. No.

“Q. Who did you talk to?”

“A. Arnett, the sales manager.

“Q. How soon after you told him you were leaving did you actually leave?”

“A. At the end of the month.

“Q. The end of February?”

“A. I think it was February, the end of February I left.”

Does that refresh your recollection?

A. To what? As to when I left?

Q. As to the date you left.

A. I still believe it was the end of January.

Q. And that you were probably wrong when you said the end of February in this deposition? What makes you think that?

A. Probably searching my mind of it.

Q. You continued to be pretty busy on Downer's and your own behalf until you quit, didn't you?

A. I would say so.

Q. And I think you testified, either at the trial or the deposition, I don't know which, that you turned in a substantial amount of orders to the Downer Company the very day you left, do you recall that? [620]

(Testimony of Elmer Lysfjord.)

A. That is true.

Q. So that you were busy getting those orders during that period, I take it? A. Yes.

Q. And it took a lot of doing to get them?

A. That is a matter of opinion. What are you talking about doing? Are you talking about hours of a day or the amount of effort placed in it, or what are you referring to?

Q. You worked hard and diligently to get those orders, didn't you?

A. I consider myself working hard and diligently all the time.

Q. All right. Now, Mr. Lysfjord, in connection with this list of invoices which are summarized under Exhibit 40 for identification, and the tabulation which accompanied them, I am going to ask you, if you will, to take the adding machine tape that is attached or clipped to these sheets, and I will ask you to verify the figures of the footings of the pages that are on this list while I read them with Mr. Ackerson so he can check those amounts, and if there is any error there please correct me. I just want to be sure that those footings are all on that adding machine tape.

The first page is \$10,163.61. Does that check?

A. Yes, sir.

Q. The next page is \$13,994.06. [621]

A. Yes, sir.

Q. And the next page is \$10,877.21?

A. Yes, sir. [622]

Q. The next page is \$10,979.05?

(Testimony of Elmer Lysfjord.)

A. Yes, sir.

Q. The next page is \$9,315.93?

A. Yes, sir.

Q. The next, \$12,026.84? A. Yes, sir.

Q. The next, \$13,448.09? A. Yes, sir.

Q. And the last, \$7,004.18? A. Yes, sir.

Q. And the total of that, I believe, is \$87,808.97?

A. That is what it says, but I can add up differently right now.

Q. What did you say?

A. That is what it says, but I can add up differently right now.

Q. Can you? If you can, let me know. I think it is correct.

A. You are right. I was adding it as I went along, was all.

Q. I don't think the adding machine hit the wrong key on that one, Mr. Lysfjord.

Mr. Ackerson: It did once before, Mr. Black.

Q. (By Mr. Black): I just wanted to verify that is the total of the footings of all these summaries. [623]

Now, I think you told me, Mr. Lysfjord, that every item, other than acoustical tile, has been eliminated from this calculation, to arrive at that total.

A. I said the young lady was instructed to do so. And I answered several questions.

Now, what is actually in there was in the hands of Mr. Hamiel and not me. I kept myself away from any part of that.

Q. So you don't know then, of your own knowl-

(Testimony of Elmer Lysfjord.)

edge, whether it does, in fact, include items other than acoustical tile?

A. I believe Mr. Hamiel mentioned also decorative tile.

Q. Well, did Flintkote handle decorative tile?

A. Yes, sir.

Q. What lines? A. Flintkote tile.

Q. Was that in your contemplation when you were contemplating these relations that you would take decorative tile as well as the ordinary acoustical tile? A. Why, yes, sir.

Q. I show you one page of this. I am not going through the whole thing, but I want to ask you about a few of these items on page 6 of this summary.

We find here an item and it says, "Old mold." Do you know what that is?

A. That is a molding fiberboard molding, but that is [624] only \$2.35.

Q. I know it is. I am just asking what the item is. What is a "Wood starter strip"?

A. That is a piece of material used with acoustical tile, to facilitate in its operation.

Q. And this item "Fiberlite"?

A. That is "Fibertile."

Q. "Fibertile." Is that an acoustical tile?

A. That is what is referred to as decorative tile.

Q. Is that true of this item of \$87.00—or \$33.00. Are these all decorative tiles, fibertile?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. What is the item marked "Birch." B-i-r-c-h?

A. I don't know. I would have to check the invoice to see what it is.

Q. Is that a plywood?

A. I wouldn't know.

Q. Would it be an acoustical tile marked "Birch"?

A. I assume not.

Q. What is an item marked "AA int," i-n-t?

A. I do not know.

Q. There are three such items?

A. Yes.

Q. And there are two more items marked "Birch."

A. That is not "Birch"—this one is (indicating). [625]

Q. Not these two?

A. One is.

Q. One says B-r-d-h, isn't that the same as the next item?

A. Possibly.

Q. What is "int AD"? Do you know what that is?

A. No, sir.

Q. What is "Lusterlite"?

A. Decorative tile.

Q. Is that similar to anything that Flintkote handled?

A. Yes, sir.

Q. What is "Building board" here, \$693.44?

A. That is a fibertile of a sort, a larger size. It is a fiber material.

Q. Is that anything like Flintkote carries?

A. Yes, sir.

Q. What is the size of that?

A. Four foot by eight foot.

Q. There are some of these items, anyway, which

(Testimony of Elmer Lysfjord.)

makes it rather apparent, at least a few items on this list are not acoustical tile, am I right?

A. I wouldn't say that. I would have to find out what they are before I could say that.

Q. Anyway, apparently you don't know whether this is all acoustical tile or not all acoustical tile, of your own [626] knowledge, is that right?

A. That is correct.

Q. Now, on what do you base your statement that you thought you could sell a car a month during the first year of your operations?

A. Based on the amount of material I had sold in the past.

Q. In what connection, with Downer Company?

A. When I was associated with Downer Company, yes, sir.

Q. What induced you to think that you could sell more than that after the first year of your operations?

A. Well, mostly because of increased amount of money to be able to handle more tile.

Q. Is there anything that enabled you to fix, based on any experience of your own, how much more tile you would be able to sell?

A. Surely, all the time I have been selling; each year I have increased my sales quite a bit.

Q. In that ratio?

A. I would say probably so.

Q. Did you sell 50 per cent more tile in 1950 than in 1949?

A. As a matter of fact, I did.

(Testimony of Elmer Lysfjord.)

Q. Did you sell 50 per cent more than that in the following year? [627]

A. You mean the preceding year?

Q. No.

A. We are going backwards, aren't we now?

Q. How much tile did you actually sell during the first year of your operations in the aabeta co.?

A. Dollarwise?

Q. Yes.

A. I can't recall. Our books will show it.

Q. Your books will show that?

A. Yes, sir.

Q. It didn't amount to a car a month, did it?

A. No, sir.

Q. Yet you had somewhat better than a car, about a car and a half of Flintkote tile to sell at the very outset, didn't you?

A. That is the amount of tile we ordered, or, rather, that was delivered to us.

Q. It was a good many months before that tile was used up, wasn't it?

A. There is a very good reason for that, if that is true. Now, I don't know if it took us that long. You are stating that. The reason for that probably—not probably, but actually is we had to save that material to finish the jobs already sold and in our files, and not allowing us to go out and get any new business. [628]

Q. Do you know that?

A. Do I know that?

Q. Yes. A. That that is the reason?

(Testimony of Elmer Lysfjord.)

Q. Yes. A. Yes, sir.

Q. The tile that you were supplied by The Flintkote Company, to fill orders which were firm contracts at the time of the termination, was supplied to you in addition to the car you had already ordered, was it not? A. Yes, sir. [629]

Q. You weren't required to go back and apply that tile to the new contracts?

A. I don't follow you.

Q. Well, I mean to say when you went to the Flintkote Company with contracts and requested them to supply tile to fill those contracts they stood on their own footing, didn't they? You just ordered the tile needed for those jobs.

A. That is true.

Q. And they didn't deduct from that the fact that you had had a car before?

A. No, sir, they did not. However, we have bids that wouldn't come into our office for probably two or three months after they are originally made, and those are the ones we have to protect.

Q. I understand that.

A. We are protecting our word.

Q. They didn't deduct, though, from these new contracts what they had already given to you before? A. No.

Q. What was the financial position of the Downer Company generally when you were with them, the last months? A. I have no idea.

Q. Were they adequately financed, as far as you

(Testimony of Elmer Lysfjord.)

could tell? Did you get the tile, in other words, without any difficulty when you got the jobs? [630]

A. You are referring to the R. W. Downer Company?

Q. Yes.

A. Why I never concerned myself with whether they were financially stable or not.

Q. You had no trouble on that score? I mean, there was no difficulty about credit?

A. In purchasing materials?

Q. Yes.

A. I had nothing whatever to do with purchasing of materials, Mr. Black.

Q. You did have, however, the matter of supplying tile to the jobs, did you not?

A. I brought in the orders for the work. The delegation of where the material was to be bought and when it was to be done and that was in somebody else's hands, not mine. I wouldn't have the faintest idea how they ran their business as far as finances are concerned, whether they had to get loans or if they paid on time or they were 40 days late. I have no knowledge whatsoever.

Q. Did you ever experience any delays in getting tile delivered to the jobs when you were at the Downer Company, based on inability of the Downer Company to make arrangements for it?

A. Quite often, but I don't think it was financially. I think it was the fact that they didn't get around to do the [631] job. It was in the construction department end of it.

(Testimony of Elmer Lysfjord.)

Q. So far as you know, there were no difficulties with the Downer Company with respect to credit?

A. No, sir. I did not know anything of that at all.

Mr. Black: I want to confer with my associate one moment.

(Conference between counsel.)

Mr. Black: I think that is all, Mr. Lysfjord.

Redirect Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, at the time you had your deposition taken back in September, 1952, had you ever testified in a deposition or otherwise before?

A. No, sir.

Q. It was a new experience for you, wasn't it?

A. Quite new.

Q. Mr. Black asked you if you followed these figures on the take-off sheets in submitting a bid, and I am going to ask you if you ever violated your instructions along that line.

A. Yes, sir.

Q. Can you tell us about that?

A. Well, about two or three different times I was called into the office of Mr. Roy Downer with Mr. Arnett present and stating that I would have to cease bidding these jobs on my own and follow the instructions that I have been [632] given by the company, or we wouldn't be associated any longer.

Q. What did you say, if anything?

A. I said that I would attempt to get work when-

(Testimony of Elmer Lysfjord.)

ever and wherever I could, and if they felt that I couldn't be a part of their organization that all they would have to do is say so and then I would gladly leave and go somewhere else. [633]

Q. Now, Mr. Black referred to this page as 6 forming part of the Plaintiffs' Exhibit 40 for identification.

I just want to see what these items were that he covered, that he referred to. I think I took notes on it, Mr. Lysfjord.

It is on page 6. Will you turn to page 6?

(Witness complies.)

Q. You recall the first item that was called to your attention? Was it wood strips, or something of that sort, or was there an item ahead of that?

Mr. Black: "Old mold" I think was the first one.

Mr. Ackerson: A mold?

Mr. Black: "Old mold."

Mr. Doty: "Old mold."

Q. (By Mr. Ackerson): Do you find it, page 6?

A. Yes, there is "old mold."

Q. What was the amount of that item?

A. \$2.35.

Q. What is the amount of this "birch" item?

A. \$32.77.

Q. Is there an "AA int"? I understood you were asked about that.

A. Oh, yes, here (indicating); \$21.60.

Q. I believe you stated that building board item of—what was that, five or six hundred dollars?

(Testimony of Elmer Lysfjord.)

A. \$693.00. [634]

Q. That was a product comparable to a product manufactured by Flintkote?

A. That is true.

Q. Mr. Black commenced reading originally in this deposition, I believe, at page 72, down near the bottom of the page.

Now, the second line on the same page, Mr. Scully said:

“When did you receive the copy of this letter, of which this is a photostat?”

“The next day from that date” is your answer.

“Q. About the 18th of January, 1952.

“A. That’s right.”

Mr. Black: That is the wrong thing, Mr. Ackerson.

Mr. Ackerson: I don’t think so, Mr. Black.

Mr. Black: Yes. That is the Louie Downer letter.

Mr. Ackerson: Oh, I beg your pardon. I was trying to clear things up. That was the letter from Louie Downer relating to purchase?

Mr. Black: Yes. The San Bernardino territory letter.

Mr. Ackerson: Yes.

Q. (By Mr. Ackerson): Mr. Black called your attention to another statement in your deposition but I think you can recall it without returning to the page.

Mr. Ackerson: I am referring to page 259, Mr. Black.

Q. (By Mr. Ackerson): In which you stated

(Testimony of Elmer Lysfjord.)

that as of [635] the date of that deposition you didn't think this price-fixing and bid-allocation business was going on among the contractors. Do you recall that? A. Yes, sir.

Q. Will you explain, if you can, the basis for that thought or opinion expressed at that time?

A. Well, in bidding our own work, trying to get jobs, the over-all picture at that particular time of the markup that you could put on a job and still be able to get it was so low that I was quite sure there wouldn't be much sense in getting together and having low prices.

It would be the opposite effect they were after.

Q. In other words, you concluded from your experience in sampling the market by bidding that the prices were too low to have had the scheme still operating? A. That is right.

Q. This was in your deposition in September, 1952, do you recall that? A. Yes, sir.

Q. Now, have you had occasion to revise that opinion with respect to a later date, as to whether or not the prices are higher or lower than they were in September of '52?

A. The smaller jobs are generally about the same.

Mr. Black: Pardon me. What period of time does this relate to? [636]

Mr. Ackerson: Since 1952, September.

Mr. Black: Let's get the period fixed a little more definitely.

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: Very well.

Mr. Black: He said the prices "are." [637]

Q. (By Mr. Ackerson): Can you give us any facts, Mr. Lysfjord, as to the time when you observed these prices changing, if they did change, the time of the change, that is, with respect to September, 1952?

A. Well, a matter of probably four or five, six months later. It is hard to say exactly a particular date because you don't pick up a trend overnight. It is a matter of searching in through the amounts, the mark-up that you can have over a period of time. And the smaller jobs, up to \$8000 or \$10,000, were very, very competitive, and from that point on up in price, the larger jobs, upwards of \$50,000, \$60,000 and \$100,000, the jobs were very, very high.

Q. Now let me ask you this, Mr. Lysfjord: When you submit a bid on a job to subcontract the acoustical tile and after that bid is awarded to an acoustical tile contractor, do you as a bidder, an unsuccessful bidder, have a right to see the bid of the successful bidder? A. Yes, sir.

Q. Is that the manner in which you would make your determination as to whether the price was high or low? A. That is true.

Q. In other words, it was by checking the bids after the job was let? A. That is true. [638]

Q. Can you name any specific instance that would substantiate your statement you have just made concerning the variance in price after September, 1952?

(Testimony of Elmer Lysfjord.)

A. I remember a school job called the Airport Junior High School, I believe. It was a job upwards of \$60,000 or \$70,000 worth of work, and we bid the job with the intentions of, if we were fortunate enough to get it, we would have enough profit in it to be worth while. By that I mean we had our mark-up somewhere around 50 per cent above our basic cost. And the contractor that was successful in getting it was about \$200 or \$300, or maybe \$400, under our figure. So you can see that that particular job was quite high.

Q. You checked that job, I mean the aabeta company checked the bid figures on that job?

A. Yes, indeed.

Q. You know about when this check and bidding took place?

A. This particular job was probably about six, eight months ago.

Mr. Black: That of course is objected to as being a matter that obviously relates to a period far beyond the period recoverable in this case.

Mr. Ackerson: It isn't important anyway.

That is all, Mr. Lysfjord.

Mr. Black: One more question or two, Mr. Lysfjord. [639]

(Testimony of Elmer Lysfjord.)

Recross-Examination

By Mr. Black:

Q. Referring again to this matter of these low prices, I refer to the same deposition at page 13, line 24, where the question was asked:

“Q. Would you say the business is said to be a cut-throat business, competitive business?”

“A. Are you speaking of now or then?”

“Q. Well, let’s break it up. Then.

“A. It was not then.

“Q. It was not then. Is it now?”

“A. It is, now.

“Q. And how long has the present cut-throat condition, cut-throat competitive condition of the acoustical tile contracting industry existed?”

“A. Three months, approximately so.

“Q. From about June of ’52?”

“A. May or June, somewhere in there.”

Does that refresh your recollection, Mr. Lysfjord, as to the period you were talking about with respect to your opinion as to the cessation of any price rigging or anything of that sort?

A. Did I state that there was a cessation of it?

Q. We called your attention to the fact that you gave an opinion that they were no longer refraining from competing [640] or something of that sort.

A. What is the question you want me to answer?

Q. I am asking you now whether that helps, this testimony I have just read—you gave it, didn’t you?

(Testimony of Elmer Lysfjord.)

A. Yes, sir.

Q. —if it helps you to fix that time as to which that opinion relates.

Mr. Ackerson: You mean when it started?

Q. (By Mr. Black): The cut-throat competitive period started in May or June of 1952, according to your testimony. A. That is true.

Q. And that is the period that you are talking about, isn't it?

A. Answering that question, yes, sir.

Mr. Black: Very well. That is all.

Mr. Ackerson: No further questions.

(Witness excused.)

The Court: Next witness.

Mr. Ackerson: I will recall Mr. Waldron on the limited question of damages, your Honor.

WALTER R. WALDRON

recalled as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows: [641]

Mr. Ackerson: Let me have Exhibit 38, please.

(The exhibit referred to was passed to counsel.)

Mr. Ackerson: Might I inquire, your Honor, whether this same schedule will proceed tomorrow? The reason I am asking is that Mr. Lysfjord has a

(Testimony of Walter R. Waldron.)

hospital appointment in the morning. We are through with him.

The Court: His presence here will not be required?

Mr. Ackerson: No.

The Court: I expect to continue tomorrow the same way.

Mr. Ackerson: I mean in the morning. I think Mr. Lysfjord can be here in the afternoon in any event and we can continue in the morning without him.

The Court: We expect to continue Friday on half days. This type of case is, by the nature of the case, dull, kind of hard to take, and I don't think that you can hold the attention of a jury over a full 4½- or 5-hour court day, so it is not provident to work on it more than substantially half days.

Mr. Ackerson: I heartily agree. It is not only difficult to the jury, your Honor, but to the court and the lawyers both.

I just wanted to explain that Mr. Lysfjord's routine was going to change tomorrow and that Mr. Lysfjord would not be here in the morning. [642]

Direct Examination

By Mr. Ackerson:

Q. Mr. Waldron, you have before you Exhibit 38?

A. Yes, sir.

Q. Can you state what that is generally?

A. Sheet 1. Is that what you are referring to?

(Testimony of Walter R. Waldron.)

Q. Yes. It is composed of three sheets.

A. Yes, sir.

Q. Sheet 1 contains what sort of information?

A. Well, it a recap of the other sheets I imagine composing the commissions and expected profits in a seven-month period breakdown here, and that is the figures are derived from the build-up of work and sales I had with my former company, and the same processes you have here computed there which arrive at \$2500 per month after these figures on the right, the percentage figures, are worked out.

Q. And the base figure, I take it, would be the base figure of your earnings, \$1250 a month with the Downer Company?

A. That was my build-up at the time I left and the field was not saturated at that moment.

Q. What do you mean by the field was not saturated at that moment?

A. There was no limit to the acoustical field, and it hasn't had a limit yet, and in my experience in it every year [643] has been a better year for the acoustical industry, and I believe I am safe in saying it will be another 20 years of good work in Southern California.

Mr. Black: That is objected to.

Mr. Ackerson: That has nothing to do with the damage question, Mr. Black. It may be stricken.

The Witness: I am so enthused with Southern California progress in the world that I just can't help but brag on it.

Q. (By Mr. Ackerson): But it was based on

(Testimony of Walter R. Waldron.)

your, what your average for the year with the Downer Company was, or otherwise?

A. I don't have my '50, I have the '51 and '52, and I had the last payment there in January, which was about a month or so, and then later on we got a final settlement, but it was \$1500, and I believe my sales of the last three or four months there was about that or greater in profit. I forget just what it was in 1951 because I don't happen to have that return. At least I haven't found it.

Q. It is your statement then that this basic figure, one-half of \$2500 per month, is reflected by your earnings from the Downer Company?

A. Yes, sir.

Mr. Black: That is objected to as leading.

Q. (By Mr. Ackerson): State the fact, Mr. Waldron. [644]

A. Well, that is how I arrived at this figure with my build-up of the work I done with these people, and that was the results by the time I left, and that in turn is based on your former calculations over here that we arrived at a figure shown on the right.

Do you want me to go through this, too, Mr. Ackerson?

Q. Yes, if you can go ahead and explain the basis of each of those figures there, it may save time.

A. Well, yes.

In a seven-month period the return to me should be \$17,500, and a loss of money in the San Bernar-

(Testimony of Walter R. Waldron.)

dino area again is equal, as this is, \$960 as a share of loss, you know, which totals \$18,460.

Now less one-half of the year's total profits that we earned, nets a total loss of \$17,245.

Have these figures been checked, by the way?

Q. Yes. I don't think there is anything wrong with those figures. I mean there is no mechanical errors in them.

Proceed on to the next group of figures. Go right ahead.

A. Yes, working out the—what I feel as any salesman with experience of at least eight or ten years in this field could do—on this particular one here, I am getting on another subject, but actual cost of purchases, this is on the acoustical tile we purchased.

Q. Yes.

A. Which comes up to a figure of \$87,808.97. That is not a part, by the way, of the Flintkote purchase—

Q. That is exclusive?

A. —as I understand it.

Q. That is exclusive of the first carload of tile, you mean?

A. Yes. I understand that is not supposed to be included here.

Now, on that it has been estimated, since we paid at various times more than this amount covers of 17 per cent overpayment, we felt this was very fair and which meant we should have paid, had we purchased from The Flintkote Company, \$66,503.40.

(Testimony of Walter R. Waldron.)

Q. That is the figure that was incorrect.

A. Is that still incorrect?

Q. Mr. Hamiel stated it was a mechanical error. [646]

A. Is this one still incorrect here (indicating)?

Q. Yes. The record should show that that figure should read \$57,005.40.

Mr. Ackerson: And while we are about it, Mr. Black, the next figure under that should, therefore, be \$12,758.57. And the final figure on the first page should be \$6,379.28.

Q. (By Mr. Ackerson): So I think that you had better refer that to the second figure, the second figure which is actually fifty-seven thousand-plus, rather than sixty-six thousand.

Are you through explaining that?

A. Well, I don't have the correction made on this exhibit. I guess it was left here.

Mr. Ackerson: I wonder if we might correct that, Mr. Black, by interlineation now?

Mr. Black: Yes, subject to my right to exclude the whole thing when the time comes.

Mr. Ackerson: Yes, you may object. Do you care to check this with me, the changes, Mr. Black?

I will do the same thing on Exhibit 39, if you have it, Mr. Clerk.

The Clerk: The witness may have it.

Mr. Ackerson: That is right, Mr. Clerk.

Q. (By Mr. Ackerson): As I understand your testimony, this seventy-five thousand-plus figure then represents your [647] calculations of what 17

(Testimony of Walter R. Waldron.)

per cent of the excess—17 per cent over Flintkote carlot price would be, is that right? A. Yes.

Q. How much you would have paid for it from Flintkote? A. Yes, sir.

Q. The \$75,000.00 figure is what? What you would have paid for the same tile had you been able to get it from Flintkote? A. Yes, sir.

Q. What is the next figure of \$12,758.57?

A. That is an amount we paid greater than competitive firm purchasing from Flintkote.

Q. Now, what is the last figure?

A. That is a share of the overpayment, I will call this \$12,000.00 figure. That is the share chargeable to me as my share of overpayment.

Q. Now, turn to the next page.

The Court: How long will it take to go through the document, Mr. Ackerson?

Mr. Ackerson: I think maybe another 15, 20 minutes.

The Court: We had better adjourn then.

Mr. Ackerson: All right.

The Court: We will adjourn until tomorrow at 1:30 for this case. The court, until 9:30.

(Whereupon, at 4:35 o'clock p.m., Thursday, May 12, 1955, an adjournment was taken to Friday, May 13, 1955, at 1:30 o'clock p.m.) [648]

Friday, May 13, 1955—1:30 P.M.

The Court: The jurors and alternate being present, you may proceed.

Mr. Ackerson: Will you take the stand, Mr. Waldron?

WALTER R. WALDRON

called as a witness on behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Black: I think that is a tabulation, isn't it?

Mr. Ackerson: Yes.

Mr. Black: I think Mr. Doty has that. He was making a copy. We came up without our copy.

Mr. Ackerson: It isn't in court?

Mr. Black: I think he has it. He thought he would be through in time. Can you use Mr. Lysfjord's?

Mr. Ackerson: Yes, perhaps I can. That is Exhibit 39, and that is right on top here.

We had passed the difference in figures on this, Mr. Black, so I am turning to the third page here.

Direct Examination

(Continued)

By Mr. Ackerson:

Q. I hand you Exhibit 39 for identification, Mr. Waldron, and I will call your attention to certain figures on the third page of that exhibit. [650]

Mr. Ackerson: They should be identical, Mr. Black—

Mr. Black: I think they are the same.

Mr. Ackerson: I believe so.

Q. (By Mr. Ackerson): Mr. Waldron, your at-

(Testimony of Walter R. Waldron.)

tention is called to the third page of Exhibit 39, which we are assuming to be identical in respect to Exhibit 38 relating to your own personal affairs in the aabeta co.

Do you have as the first item there a figure of \$21,600.00? Can you tell us the basis for your calculation of that?

A. Yes, that is based upon the sales per month of \$18,000.00, which is estimated were conservative figures, and then the total amount was the yearly profits on that gross sales for that one-year period.

Q. Was that based on your Downer sales or your actual sales?

A. Yes, the Downer sales that we were doing or I was doing at the time I severed with the people over there.

Q. Now, the second figure is \$32,400.00, based upon what?

A. That is normal expected increase of 50 per cent sales on a second year period, and this, I believe, is for the year of—includes 1952, '53 and '54.

Q. Yes. \$32,000.00 figure being '53, I believe, isn't that right? [651]

A. Yes, that would be the year '53.

Q. That is still based upon your best estimate of your sales with the Downer Company?

A. Yes.

Q. Now, the third figure there is \$43,200.00.

A. That is, I would say, a conservative estimate of a 25 per cent increase over the previous year of sales for the year of 1954.

(Testimony of Walter R. Waldron.)

Q. That is your estimate? A. Yes.

Q. Now, there is a dash there and then addition, and the figure of \$97,200.00.

Will you explain that figure and the basis of your estimate of that figure?

A. That is the total of the estimated three-year period of '52, '53 and '54.

Q. That is your share of the profits of those three periods, your estimate of your share of the profits of those three years?

A. That is right.

Q. What is the figure \$21,411.50 directly under that?

A. That is my share of the earnings of the aabeta co. during that period.

Q. During the same three-year period?

A. Yes. [652]

Q. And that is '52, '53 and '54?

A. That is correct.

Q. Then you have the final figure of \$75,788.50. Will you explain your calculation in that respect?

A. Yes. We subtracted the actual, or my actual amount of earnings during that period from the estimated amount of \$97,200, and the answer of \$75,788.50 was the estimated loss due to restraint of competitive material.

Mr. Ackerson: I would like to have this next paper marked Plaintiffs' Exhibit for identification next in order.

The Clerk: That will be Plaintiffs' Exhibit 43 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked Plaintiffs' Exhibit No. 43 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I hand you Plaintiffs' Exhibit 43 for identification and ask you if you can tell me what that document purports to be.

A. Well, this is a form to show that using our estimated monthly earnings during our business time with what I was earning at the time I stopped work with the Downer Company, and without going into expected normal increases of business, we have here \$1250 per month for each plaintiff in this case, or \$2500 per month for both during the periods which equals \$90,000. [653]

Q. During what period does that purport to cover?

A. This is during the period January 1, 1952, to January 1, 1955.

Q. That you stated does not cover any estimate of increase in business, it is based solely upon your earnings with the Downer Company?

A. Yes, that is correct.

Q. Now the \$90,000 in that particular item constitutes what?

A. The \$90,000 only constitutes the \$1250 a month for myself and for my associate during the 3-year period, or 36 months of the three years in question here.

Q. In other words, the salary or commissions

(Testimony of Walter R. Waldron.)

which you state you earned from the Downer Company prior to going into business without more, is that correct? A. That is right.

Q. Now you have under that the figure of \$42,823. What is the significance of that figure? What do you base that figure on?

A. On our books that we have here of the total earnings of the aabeta company during that period.

Q. During what period?

A. January 1, 1952, to January 1, 1955.

Q. And by the books you mean this ledger book that has been marked for identification? [654]

A. The general ledger.

Q. And you are referring to Exhibit 42 for identification, Plaintiffs' Exhibit 42? A. Yes.

Q. Now, Mr. Waldron, you have a third figure on that column, on the tabulated side, the sum of \$47,177. Can you explain that figure?

A. Yes. The \$90,000 based on the monthly earnings before we entered business and we subtracted the actual earnings during that 3-year period and that would be the net loss based upon the earning period we had prior to going into business.

Q. In other words, the \$47,000 plus figure is the difference between what you actually earned with the aabeta company during that 3-year period as against the salary projected during that period that you were earning with the Downer Company?

A. Yes.

Q. Now there is a fourth figure of \$90,000. How did you arrive at that figure?

(Testimony of Walter R. Waldron.)

A. That is if we were to go into it and assume the normal business would return, as we have in the past and so calculated on your blackboard, there would be an additional \$90,000 as a profit for a company after you take the overhead and sales costs out. [655]

Q. Then the next figure, the next succeeding figure is again \$47,177. How did you arrive at that figure?

A. That was the figure we had net loss based on the first figure of \$47,177. We brought that down and added it into the \$90,000. Is that the correct figure that you are working on? [656]

Q. Yes. Now then, the \$90,000.00 under that last \$47,177.00 is what?

A. That is the figure of the—owner's profits as before stated, after overhead and sales costs have been deducted.

Q. Now, you have a final total figure there of \$137,177.00. Would you tell us what that consists of, how you arrived at that?

A. Yes. That is the salary loss figure of \$47,177.00, and then the normal profits as an owner loss of \$90,000.00; added together we arrive at \$137,177.00.

Q. These exhibits, or this Exhibit 43 for identification, which we last referred to, and Exhibit 38 constitute your estimates of your total losses or damages in this case, as far as it applies to you personally?

A. Yes. We didn't bring into consideration from

(Testimony of Walter R. Waldron.)

the end of '53 or '54. We are not considering anything as of the first of the year up to date.

Q. Did you consider in this last Exhibit 43 for identification any factor prior to January 1, 1952?

A. No, sir.

Mr. Ackerson: Your Honor please, I will offer Exhibits 38, 39—I will take them separately.

I will offer Exhibit 38 in evidence as a tabulation of this witness' estimate of his damages. [657]

Mr. Black: To which we object, the court please, on the ground that no foundation whatever has been laid for the figures showing in this document.

It has been proved demonstrably erroneous. It is based on the sheer speculation of these witnesses on completely gratuitous assumptions, events that have no basis in the evidence as possibly foreseeable.

And for the further reason it extends, obviously, the damages beyond the recoverable period in this action, namely, the date of filing of suit.

For all of these reasons and the further grounds that it is incompetent, irrelevant and immaterial, we object.

The Court: What is the foundation for it, Mr. Ackerson? State it fully for the record.

Mr. Ackerson: The foundation, your Honor, has been the manner in which the documents have been prepared, the basis of them and the purpose of the introduction is limited to a physical exhibit of the opinion evidence of this witness.

The Court: Objection overruled. Document admitted.

(Testimony of Walter R. Waldron.)

(The document heretofore marked Plaintiffs' Exhibit 38 was received in evidence.)

Mr. Ackerson: I will offer for the same limited purpose Exhibit 39.

Mr. Black: We interpose the same objection to this document, if the court please. [658]

The Court: Same ruling.

(The document heretofore marked Plaintiffs' Exhibit 39 was received in evidence.)

Mr. Ackerson: And I will offer for the same purpose, same limited purpose, Exhibit 43 for identification.

Mr. Black: To which we make the same objection, and the further objection to this document is that this builds speculation upon speculation.

This last document is predicated on the assumption that these people, establishing their own new business, would start out making precisely the same volume that they did with another company, financed by a company that was adequately financed. And gratuitously assuming that they are going to have the benefits of an owner immediately.

They start in business as of the first of the year when, on their own testimony, they didn't even start operations in the way of making any money after they got their business organized for several months.

It just is demonstrably inaccurate in every possible view. On those reasons and for the others we object to this.

(Testimony of Walter R. Waldron.)

The Court: The further reason goes to the weight of the evidence, what weight will a jury give it. They may accept it in whole or they might accept it in part or they may reject it.

It might be subject, as an estimate, to considerable [659] modification before it is accepted, if it is ever accepted at all, as an appropriate measure of damages, if any are awarded.

The objection is overruled. The document is admitted.

(The document heretofore marked Plaintiffs' Exhibit 43 was received in evidence.)

Mr. Ackerson: You may cross-examine, Mr. Black.

Cross-Examination

By Mr. Black:

Q. What was your initial investment in the aabeta co., Mr. Waldron?

A. You are speaking of dollars?

Q. Dollars.

A. In addition to my 20 years, I guess.

Q. I am speaking of dollars at the moment.

A. I think the initial investment during the year of '52, as we needed it, was around five, six thousand dollars on my behalf.

Q. Well, I meant by "initial," what was the amount you put into the business when you started?

A. Actually whatever we needed. I think we put in about six thousand—or about six thousand, I think, or nine, six or nine.

(Testimony of Walter R. Waldron.)

Q. The two of you?

A. I believe so. We usually do—I think so. [660]

Q. And for the entire year, how much money did you put into the business, yourself?

A. All of the profits, Mr. Black, were put back into the business, in addition to moneys of our own, and we didn't draw out of the business that year. We used our own private money. So any moneys that were made, whatever the books show, were re-invested back into the business. I don't know what the total of that is.

Q. Did you put any more than the \$3000 of your own money into the venture?

A. Oh, yes. I put in somewhere around \$5,000 I believe.

Q. In addition to the plowing back of earnings, you mean? A. Yes.

Q. When did you put in the additional \$2000?

A. I don't know. Some time during the first part of the year when it was necessary.

Q. Would that be reflected by the books of the company? A. I believe it would.

Q. Can you turn to the account where that appears?

A. I doubt if I could, Mr. Black. I am not acquainted with the book.

Q. What do you base your statement that you put in the [661] \$2000 on? Is it just your own recollection?

A. It was deposited, and I am sure there is a credit there in my behalf for it.

(Testimony of Walter R. Waldron.)

Q. But you don't know enough about the books to point to the place where it would show?

A. No, I don't know how to even find it, sir. I am sure it is there and I believe someone with knowledge of the books could find it.

Q. I presume that is so. I was just testing your knowledge of it.

Did Mr. Lysfjord put in a similar sum to you?

A. Yes, I am sure he did.

Q. Did you match dollar for dollar what you both put into the company?

A. Not always, but we tried to very closely.

Q. So that to the best of your recollection, then, the entire amount that you have put in of your own funds into this venture was \$5000?

A. Somewhere in that neighborhood the first year, yes.

Q. Thereafter did the business carry itself?

A. Virtually.

Q. You didn't have to make any additional investment beyond what you earned from the business itself?

A. I would have, Mr. Black, and I anticipated it, but when we lost our line of supply it curtailed our activity a [662] great deal.

Mr. Black: I will move to strike that as not responsive, your Honor.

Mr. Ackerson: I think it is responsive, your Honor.

Mr. Black: We have something for a ruling,

(Testimony of Walter R. Waldron.)

your Honor. Would the reporter please read the question and the answer and the objection?

The Court: Yes. I was busy on another matter. Read it, Mr. Reporter.

(The record referred to was read by the reporter as follows:)

“Q. You didn’t have to make any additional investment beyond what you earned from the business itself?”

“A. I would have, Mr. Black, and I anticipated it, but when we lost our line of supply it curtailed our activity a great deal.

“Mr. Black: I will move to strike that as not responsive, your Honor.

“Mr. Ackerson: I think it is responsive, your Honor.”

The Court: Motion granted.

Q. (By Mr. Black): Then would you please answer the question? Would you repeat the question, Mr. Reporter? [663]

(The question referred to was read by the reporter as follows):

“Q. You didn’t have to make any additional investment beyond what you earned from the business itself?”

Q. (By Mr. Black): That calls for a yes or no answer, Mr. Waldron.

A. Anywhere in this year you are referring to?

Q. No, during the entire history of the business.

(Testimony of Walter R. Waldron.)

A. Yes. Later on I put another \$3000 into the business. I believe you will find that in there but I think that was in '53—I don't know—'52 or '53.

Q. Beyond what the business was earning?

A. Pardon?

Q. Beyond what the business itself was earning? Was that an additional \$3000 that was put in in addition to what you had plowed back into the business? A. I think it was, sir.

Q. Are you sure of that? A. Yes.

Q. And you think it was sometime in 1953, then?

A. I am not sure of the time, Mr. Black, but there would be an entry there.

Q. Are you sure of the amount?

The Court: Counsel, excuse me for a moment. This matter [664] that we have been discussing on the side with the probation officer involves a long distance telephone call which he has managed to put through to a distant official, and he is still on the line, and he asks that I should talk to him. So we will stand in short recess while I do that.

(Short recess.) [665]

Q. (By Mr. Black): Do you know how much working capital the Downer Company had during the period you were operating with them?

A. No, I don't.

Q. Have you any idea of that at all?

A. No, I had no way of knowing that, Mr. Black.

Q. How were your sales commissions actually

(Testimony of Walter R. Waldron.)

computed when you were working with the Downer Company?

A. After the actual costs of the jobs were estimated, and before overhead was entered into the picture, the remaining sum would be the gross profits that I participated in.

Q. What do you mean "the remaining sum"?

A. After the job costs are deducted.

Q. What went to make up the deduction as a job cost?

A. Material and labor.

Q. Anything else?

A. Only thing I can think of, taxes, insurance on labor, trucking or cartage facilities.

Q. Was that a sum that varied each time with every job?

A. Only in the sense of the volume. Taxes would be greater with greater volume. Insurance on labor would be greater if there were more labor spent. But the per cent would be the same in each case.

Q. All right. After the job cost was deducted from the gross receipt of the Downer Company for the particular job— [666]

A. It would be deducted from the contract price.

Q. After that was done, what percentage of the remainder did you receive as a commission?

A. About one-third, sir.

Q. One-third? A. Yes.

Q. Was that the same on all jobs, public or private?

A. I believe it was, except the last month or so and they lowered the percentage for salesmen on

(Testimony of Walter R. Waldron.)

public jobs. I can't remember when or how early, but just four or five per cent, something like [667] that.

Q. You don't know what percentage or when it was done?

A. I don't remember that at the moment.

Q. Did you ever examine the books of the Downer Company? A. No, I never did.

Q. Now in your relations with the Flintkote Company, did you ever have any arrangement whereby you could purchase from the Flintkote Company decorative tile or building board?

A. Yes, it was my understanding—you see, a decorative tile is blank before perforation, and we were to buy that as we needed it, and that is used in our line a great deal.

Q. Now, when did you make those arrangements?

A. At the time we made the arrangement to become a distributor for the Pioneer-Flintkote people.

Q. And with whom?

A. I don't know which one, Baymiller or Mr. Thompson. At any rate, that is part of their line, and the reason I wanted to bring that out as being a part, is that they had a detail of a T & G, which is a tongue and groove, that wasn't at all adapted to labor conditions and they were planning to change that on their decorative materials.

Q. Did you ever have any expressed discussion with anybody in the Flintkote Company about the

(Testimony of Walter R. Waldron.)

availability to you of decorative tile or building board? [668]

A. I believe I did, Mr. Black. I believe that that is part of the line and we have to use it.

Q. That is just your assumption, that that is part of the line. When did you have that discussion and with whom and what did you say and what was said to you?

A. At the time of the discussion of it, as I say, of the T & G joint of this decorative board.

Q. When did you discuss the T & G joints of the decorative board?

A. During the time that we were operating and in business in the early part of January or early February, because the samples were not adapted to competitive materials for labor installation costs.

Q. And with whom did you have that discussion?

A. I think it must have been Mr. Ragland because he would be the one that had the sample and we would work through him on anything we needed. That was understood.

Q. Do you actually remember such a discussion?

A. Yes, Mr. Black, because of the detail of that T & G joint was disturbing in labor.

Q. Didn't you know, as a matter of fact, based on your general knowledge of the acoustical business in this community, that the Flintkote Company has never supplied any acoustical contractor with building board or decorative tile on a direct [669] basis?

(Testimony of Walter R. Waldron.)

A. I don't know what they are doing now, but——

Q. I am talking about ever.

A. I don't think——

Q. Since they started the line.

A. I know that that was our concern, and they were going to arrange to change that.

Q. And you say Mr. Ragland told you that they would change it?

A. Yes, as a matter of fact, I believe they did.

Q. When did they do it?

A. I don't know. It was some time after we were severed there.

Q. Where was this discussion had?

A. I believe it was in my office here in Los Angeles.

Q. Did you ever place an order with Flintkote for building board or decorative tile during the time that you had any relations with them?

A. No, sir.

Q. Now referring to Plaintiffs' Exhibit 38, Mr. Waldron, did you have anything to do personally with the calculation of the figure which you set out as the actual cost of tile purchased occurring on the first page of that exhibit in the amount of \$87,808.97?

A. No, as I remember, that was handled by our accountant. [670]

Q. Do you have any personal knowledge so far as the correctness of this list goes?

A. Only that I understand it is correct and it

(Testimony of Walter R. Waldron.)

would be substantiated by the invoices it was taken from.

Q. Did you examine the invoices?

A. No, I didn't.

Q. Did you examine the books?

A. Our books?

Q. Yes. A. Regarding this item?

Q. Yes. A. No, I didn't.

Q. Do you have any personal knowledge as to the correctness of that figure?

A. I didn't do the job of tabulating this. I believe it is correct, however.

Q. Do you have any knowledge based on what you personally examined as to whether that figure is entirely composed of acoustical tile or other materials that you had a right to purchase from Flintkote on a preferential basis?

A. No, I don't know. My understanding is it is supposed to be acoustical tile.

Q. But you don't know at all of your own knowledge?

A. I believe it is acoustical tile. I didn't examine it. [671]

Q. Please answer my question. And it is entirely based on what you believe from what somebody told you, is that right?

A. In this case it was my belief that it was acoustical tile, decorative tile. [672]

Q. But you never made any personal check whatever?

A. I didn't check it, that is right, sir.

(Testimony of Walter R. Waldron.)

Mr. Black: I move to strike——

The Court: Who prepared this statement or estimate, or whatever the exhibit is?

The Witness: My associate and my accountant.

Mr. Black: I renew the motion to strike the exhibit on the further ground it is demonstrated by the witness' own statement he doesn't have any idea of the correctness of that figure whatever.

Mr. Ackerson: The foundation, your Honor, I might suggest was laid by Mr. Lysfjord and the accountant, as to what the instructions were and what was purported to have been done.

The Court: Did their testimony relate to this particular document?

Mr. Ackerson: Yes.

The Court: You mean Mr. Lysfjord testified——

Mr. Ackerson: Mr. Lysford and Mr. Hamiel. I think Mr. Black cross-examined them both on them.

The Court: Was the document marked for identification at that time?

Mr. Ackerson: It was, your Honor. I would like to ask one further question on voir dire, if I may.

The Court: All right. [673]

Mr. Ackerson: Did you instruct your accountant or the people who prepared this Exhibit No. 40, that is, all the invoices and the corresponding exhibits, as to how it should be done?

The Witness: Yes, we asked—or I asked in my behalf to have it arranged with the acoustical tile, or fibertile, or fiberboard that we have used.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: And that document was prepared under your instruction and your partner's instruction?

Mr. Black: That is objected to as leading.

Mr. Ackerson: Well, I don't believe the witness understood.

State the fact then, Mr. Waldron.

The Court: Objection overruled.

The Witness: That is right. However, I didn't examine the results as per tabulation. I didn't put it on the machine, or anything of that nature.

Mr. Ackerson: In other words, you didn't go over each invoice and check it with the person you instructed to do the job, as to accuracy of each item?

The Witness: No. There were two people working on it, one the accountant and one his secretary or girl he had. I have confidence that it is true.

Mr. Ackerson: They did follow your instructions?

The Witness: Yes. [674]

Mr. Ackerson: I submit, your Honor, this foundation was laid and has been cross-examined by Mr. Black, both as to Mr. Hamiel and Mr. Lysfjord, and I think it is clearly admissible.

Mr. Black: It has been completely demonstrated that there are a lot of things in this item admittedly that do not belong in it. The amount of it is still uncertain, but it is proved that it isn't accurate.

Mr. Ackerson: Well, Mr. Black has pointed out

(Testimony of Walter R. Waldron.)

a \$2.00 item and a \$3.00 item and two or three things like that. He has had it for two or three days——

Mr. Black: Do you want me to spend the day on it, I can go through every invoice in it.

Mr. Ackerson: I don't mind if you do. It still goes to the weight of the document.

Mr. Black: I submit if we prove there is one dollar off we have shown the document is wrong. You have made no effort to correct the thing and eliminate the items the witnesses so far have admitted don't belong in it.

Mr. Ackerson: I submit that goes to the weight of the document, not to its foundation or admissibility.

The Court: The motion to strike the exhibit is denied.

Q. (By Mr. Black): What is the basis for your assumption that you would have sold one car per month during the year 1952? [675]

A. This, Mr. Black: We were not starting a new business, we were just starting a new name. We had been in the business for a long time and had these associate contacts over the years.

We are sure—at least I am, that that would take place. You understand the lag, Mr. Black, of the first few months of your contracts, until building time, and in a case like that you might install, or we would probably install the most of that year's material average in the last six months. That has been done.

(Testimony of Walter R. Waldron.)

Q. Why didn't you sell a car in January, 1952, Mr. Waldron, when you had tile available?

A. I am not sure we didn't, Mr. Black.

Q. Well, your accountant has demonstrated you didn't.

Mr. Ackerson: I think that is assuming a fact contrary to the evidence, your Honor. Mr. Black is talking about sales, rather than installation.

There is no evidence here but what that carload was sold during the first ten days of their operation.

Q. (By Mr. Black): Well, do know that you sold one car in January, 1952?

A. I don't know at the moment, Mr. Black. But I rather imagine that we had commitments that would cover two cars.

Q. With whom? [676]

A. I don't know at the moment, but one——

Q. In January, did you have a commitment for two cars?

A. I don't remember, Mr. Black, but one job——

Q. Just a moment.

Mr. Ackerson: Wait a minute. Let the witness complete his answer, Mr. Black. This is argumentative, and I object to it, the witness not being able to complete his answer.

Mr. Black: All right. Let him answer.

Q. (By Mr. Black): Did you have a commitment in January 1952 for two cars of tile?

A. Are we talking about the same thing, Mr. Black?

Q. I am talking about a very simple thing. Did

(Testimony of Walter R. Waldron.)

you have a commitment in January, 1952, to sell two cars of tile?

A. I don't know if I can answer that the way you have put it to me.

The Court: He said a commitment. I take it he means a total in commitments that would equal that quantity of tile.

Mr. Black: Made in the month of January, 1952?

The Witness: I don't know at the moment, Mr. Black, and the bids we had out, which are commitments on our part and acceptable by other people, when they get around to buying their material for that piece of work, it may not be purchased until 30 days before it goes in.

That is what I mean about having commitments out. They are proposals and we are held to them, by the way. [677]

Q. (By Mr. Black): What do you understand by a commitment?

A. A proposal. If I send out a proposal or if I phone a bid in I have committed myself for that job when and if it goes in, or it is built.

Q. You mean an offer to do a job unaccepted by anybody?

A. It is not unaccepted. They accept my bid and it is accepted until they decide it is good or bad. Usually it is accepted and they don't pick it up until about 30 to 60 days before they expect an installation.

Q. By that, I take it you mean by "commit-

(Testimony of Walter R. Waldron.)

ment" a contract to supply tile that somebody has accepted and you are bound by it?

A. I am bound by my figures that I send out, Mr. Black. I am bound by any bid when that—that I send out, whether they accept it right now or not.

I am bound by that bid if they accept it six months from now; I am still bound to that one figure even then.

Q. Did you have any firm contracts made in January, 1952, for the sale of a car of tile?

A. No. It doesn't operate that way.

Q. Why doesn't it?

A. Unless the job was going in that month or early the next month there wouldn't be any, because they don't get [678] around to doing that, at their convenience, in buying the material for that particular piece of work, until about 30 to 60 days before it goes in, which might be four, five, six, seven months away, depending on the size of the job or the progress of the job.

Q. How about February, 1952, did you have any commitments for tile in that month?

A. I had many commitments out, Mr. Black, and I believe your company supplied us on that basis, didn't they, the last, odd size tile? That wasn't in the first car.

Q. That was the total of your commitments, was it not, up to the time of the termination?

A. Of odd size tile.

Q. Of any tile?

(Testimony of Walter R. Waldron.)

A. Oh, no. We had a carload there, you know.

Q. I know you did, but it has been testified to in this case that when Flintkote terminated you you were given the opportunity of buying additional tile for any outstanding commitments you then had, without deductions for the car that had theretofore been supplied you, is that correct? Or isn't it correct?

A. You are correct. However, they denied me commitments, I have signed purchase orders for, which, I believe, there are two in these exhibits some place.

Q. Those were merely sales of material [679] and they weren't installation jobs, am I right on that? A. I believe you are right.

Q. You wouldn't have made the same profit on that operation that you are claiming that affects your installation—with respect to your own installation jobs, would it?

A. I imagine it would be pretty close to the same, Mr. Black.

Q. You mean to say if you sell tile to the Downer Company you are going to get \$18,000.00 for \$6,000.00 worth of tile?

A. No. Your \$18,000.00 is an installed job, Mr. Black, and the amount of profit on that is based on the cost somewhere below \$18,000.00.

Q. How much of a markup, in point of fact, did you have on the tile that you were supposed to resell to the Downer Company?

A. I don't remember, Mr. Black, and I couldn't

(Testimony of Walter R. Waldron.)

tell you now, because we didn't get the tile from you people to give him; you refused it.

Q. Well, do you recall what the total quantity of tile you obtained from Flintkote to fill—what was the total quantity of tile you obtained from Flintkote to fill your commitments?

A. No, I don't have it in mind.

Q. It amounted to about a half a car, didn't it?

A. I don't know for sure. That could be. I am sure you have the figures there. [680]

Q. Now what facts do you base your statement that you would have sold one and a half carloads a month during the year 1953?

A. Just normal expected increase in good will and sales, promotional work, Mr. Black.

Q. This was the first new enterprise you had ever started, is that correct?

A. No, it wasn't.

Q. What prior experience have you had in starting your own business?

A. This is the only acoustical business I have worked in on my own, Mr. Black. Is that what you have in mind?

Q. So you have no prior experience to guide you in connection with the expectation of a new enterprise just starting in business, do you?

A. I can't think of one.

Mr. Ackerson: You mean the aabeta company?

Mr. Black: His own personal experience.

The Witness: In the construction field I haven't

(Testimony of Walter R. Waldron.)

had a business concerning construction work prior to that time.

Q. (By Mr. Black): That wouldn't be comparable in any way to this business, would it?

A. Construction?

Q. Yes. [681] A. That is this business.

Q. What new enterprise then did you start other than the aabeta company, and when was that?

A. The only thing I did was, I would buy and sell property occasionally, and one project of building an apartment house.

Q. This was the only business that you ever started on your own as a business, is that right, I mean apart from casual adventures in real estate for speculation or something of that kind?

A. Yes, I believe you are right there, Mr. Black.

Q. So that it boils down to this, that that figure is what you thought you would like to be able to do rather than what you thought was reasonably probable based on any experience you might have had?

A. No.

Mr. Ackerson: I submit, your Honor, that that is contrary to the witness' testimony, and is argumentative and not proper cross-examination.

Mr. Black: I will withdraw it.

The Court: Overruled.

Mr. Black: I think that is all, Mr. Waldron.

Mr. Ackerson: I have just one or two questions, your Honor. [682]

(Testimony of Walter R. Waldron.)

Redirect Examination

By Mr. Ackerson:

Q. Now, Mr. Black has asked you about your initial cash deposits with the aabeta company, Mr. Waldron, and I call your attention to Plaintiff's Exhibit 1 in evidence and ask you whether or not in obtaining this Flintkote supply you pledged the assets mentioned in that statement.

A. That is right, sir.

Q. And what were the total assets there of yourself and your partner?

Mr. Black: Pardon me. I was inattentive. Would you let me have the last question?

(The record referred to was read by the reporter, as follows:)

“Q. Now Mr. Black has asked you about your initial cash deposits with the aabeta company, Mr. Waldron, and I call your attention to Plaintiff's Exhibit 1 in evidence and ask you whether or not in obtaining this Flintkote supply you pledged the assets mentioned in that statement?

“A. That is right, sir.

“Q. And what were the total assets there of yourself and your partner?”

Q. (By Mr. Ackerson): What was the total amount of those assets as shown by that [683] statement? A. \$50,250.10.

Q. So that when you were answering Mr. Black's questions you were talking about out-of-

(Testimony of Walter R. Waldron.)

pocket money? A. That is right.

Q. Now, Mr. Waldron, did you mean to testify in your direct examination that you based your estimate of the aabeta company's losses in any wise on the capital of the Downer Company?

A. I don't believe I did.

Q. Did you base it upon the total sales of the Downer Company? A. No, my sales.

Q. You based it on your sales?

A. That is right.

Q. Without regard to other salesmen who may have been working at the Downer Company?

A. That is right.

Q. Were there other salesmen besides you and Mr. Lysfjord?

A. Yes, I believe there were three or four others.

Q. But your estimates were based upon the performance only by yourself and Mr. Lysfjord, is that correct? A. That is correct.

Q. Did you ever have any conversation with anybody from the Flintkote Company in which the Flintkote line—I [684] mean a restricted amount of Flintkote line—was discussed in connection with the aabeta company's operations? Do I make myself clear? A. I wish you would rephrase it, sir.

Q. I will rephrase it then.

Did anybody from the Flintkote Company ever tell you, Mr. Waldron, that you could only handle 12 x 12 one-half inch tile of the Flitnkote Company? A. No, sir.

Q. Did they ever say you could only handle

(Testimony of Walter R. Waldron.)

three-quarter inch 12 x 12 tile? A. No, sir.

Q. Was there any mention in any conversation as to the types of Flintkote tile that you could handle? A. No, sir.

Q. Or the types of Flintkote products, general acoustical tile products, that you could handle?

A. Not to my knowledge, sir.

Q. Now you have stated in response to a question on cross-examination that you never did place an order for, I think it was, decorative tile manufactured by Flintkote, is that correct?

A. That I didn't place an order?

Q. Yes, with the Flintkote Company.

A. That is true. [685]

Q. Did you ever have any need for decorative tile prior to February 19, 1952, when you were terminated? Did you ever have occasion to place such an order with Flintkote?

A. I didn't use any. We used one job, I think prior to their arrival of material, but we used another brand. I think it was early in January of '52 we did a suspended ceiling job for a furniture store over here on Pico and La Brea, I believe.

Q. And that was——

A. We used the decorative board.

Q. And that was before you had received your initial order from Flintkote?

A. I don't know for sure, but I think it was. However, the job was an existing building and there was no waiting period for construction, and I don't know just what time it was, but it is fast,

(Testimony of Walter R. Waldron.)

and we didn't buy it from Flintkote because it would take a delay of time to get it through the carload material that we were purchasing.

Q. So that up to the time of February 19 when you were cut off, did you have any other occasion to place an order for decorative tile with Flintkote?

A. No, we didn't have a firm contract on anything that had decorative tile in it at that time.

Mr. Ackerson: That is all.

Mr. Black: No further questions. [686]

(Witness excused.)

Mr. Ackerson: The plaintiff rests, your Honor.

Mr. Black: At this time we would like to make some motions, if the court please, which probably should be made in the absence of the jury.

The Court: Very well.

Members of the jury, you will retire to the jury room until you are called.

(Whereupon, at 2:40 o'clock p.m., the jury retired from the court room.) [687]

(Whereupon the following proceedings were had out of the hearing and presence of the jury:)

Mr. Black: May it please the court and Mr. Ackerson, at this time we move for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure, and at the same time we wish to present a motion to strike.

As both motions proceed largely on the same

grounds, I shall argue the matters that are common to both motions together and then separately deal with the motion to strike.

At this time I will not specify the precise evidence, other than simply the evidence that we are proposing to strike is the hearsay testimony regarding Ragland's alleged admissions, all evidence of alleged acts and declarations of alleged co-conspirators, or records of the Downer Company and the acoustical tile contractors, all evidence of alleged damage sustained by reason of any failure to supply tile subsequent to July, 1952, when this action was started, and all exhibits supporting any or purporting to support any damage sustained subsequent to that date.

The plaintiffs claim they have sustained injuries as the result of an alleged violation by The Flintkote Company and other persons of Section 1 or Section 2 of the Sherman Act.

They must, of course, adduce elements which tend to prove all the elements of a cause of action entitling them to recover under Section 15 of the Clayton Act. [688]

Now, one of the crucial questions in the case, therefore, is whether there is competent evidence that The Flintkote Company was a party to an unlawful contract, combination or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce.

We may state, as a basic proposition, that The Flintkote Company can be liable for refusal to sell acoustical tile to the plaintiffs only if such refusals

to sell were in furtherance of and as a consequence of a knowing participation in an unlawful contract, combination or conspiracy. That proposition is supported by the case of *Johnson v. Yost Lumber Company*, 117 Fed. 2d 53, at page 62, a case from which I have extensively read during the course of this trial.

A recent case announcing the same doctrine is *Interborough News Co. v. Curtis Publishing Company*, 127 Fed. Sup., 286 at 301.

It is also abundantly clear from the case that unless there is other independent evidence of The Flintkote Company's participation in such a conspiracy, admissions made outside of court by members of the alleged conspiracy, other than by The Flintkote Company, may not be considered on that issue.

Another basic proposition to this case, which I don't think can be disputed, is that The Flintkote Company or [689] anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy, may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatsoever.

That is, of course, the familiar doctrine of the *Colgate* case, *United States v. Colgate & Co.*, 250 U.S. 300, 39 Supreme Court 465, which has never been departed from.

Thus, the motion for a directed verdict in this case reduces itself to the question whether there is substantial competent evidence tending to prove

that defendant's refusals to sell tile to the plaintiffs were as a consequence of its participation in an illegal contract, combination or conspiracy.

In this connection, the fact that the evidence may show that The Flintkote Company declined to sell or discontinued selling acoustical tile to plaintiffs, as a result of pressure brought upon The Flintkote Company by other persons, would not in itself support a finding that The Flintkote Company participated in any unlawful conspiracy, even if that pressure was a result of a conspiracy among such other persons.

There would have to be knowledge plus participation. In order——

The Court: Wouldn't going along with those who were [690] exerting the pressure be participation? It would be a grumbling entry into the conspiracy, but wouldn't it be entry into it?

Mr. Black: No, not unless the pressure were conspiratorial in character, accompanied by combination, accompanied by threats of a group unlawfully exerting such pressure.

Individual action by the entire group would not even be an inference of an unlawful conspiracy. That is squarely held by the Yost case.

In this case The Flintkote Company, therefore, can be liable only if its refusals to sell to plaintiffs resulted from a knowing participation in the combination of the acoustical tile dealers, in connection with some unlawful combining or conspiracy brought home to The Flintkote Company.

Now, we may lay aside at the very outset any problem in this case which might confront one of the other acoustical tile dealers, if he were still a defendant in the case. We may concede at the very outside that if that were the situation there would be enough evidence in this case of something irregular at the level of bidding and price fixing to create, at least, an inference that the jury would be entitled to consider that such acoustical tile dealers were, at least, put to their proof of explaining the apparent concert that might be properly inferred from some of the evidence in this case. [691]

But the defendant in this case is not a participant in any of those operations and could not be because it is not engaged in the business of installing acoustical tile. It, therefore, can be brought into this case only if knowledge of that or some other illegal combination has been brought home to it.

The Flintkote Company, therefore, could not be found to have knowingly participated in any conspiracy, unless competent evidence has been introduced as such knowledge.

Now, the claim upon which relief may be granted cannot be established by Flintkote, by even a showing that there possibly was conspiracy among the acoustical tile contractors to prevent plaintiffs from securing supplies sold by The Flintkote Company or for any other illegal purpose.

Under the plaintiffs' version of the facts in this case, evidence that The Flintkote Company knew of the existence of such a conspiracy is indispensable. Without such knowledge, it is clear under the law

that the jury may not be permitted to find that The Flintkote Company violated the antitrust [692] laws.

Further, the fact that substantial evidence has been introduced sufficient to support a finding by the jury that The Flintkote Company yielded to pressure will not in itself support an inference that The Flintkote Company had knowledge that there was a conspiracy among the acoustical contractors to deprive plaintiffs of their source of acoustical tile.

Now since The Flintkote Company could not have participated in the conspiracy without knowing that the conspiracy existed, the question becomes critical whether plaintiffs have introduced substantial competent evidence to the effect that The Flintkote Company yielded to pressure and did so with knowledge that a conspiracy existed which had as its objective depriving plaintiffs of their source of acoustical tile.

We take the position that there is nothing in the evidence which tends to establish that fact of knowledge.

Now there is certain testimony which defendant maintains was erroneously admitted over its objection and erroneously permitted to remain evidence by the denial of a motion to strike. And in this connection we refer specifically to the testimony of Mr. Lysfjord appearing at pages 381 and 387 of the transcript, relating to the alleged admission by Mr. Ragland of a meeting at the Atlantic Avenue address where he is supposed to have made

statements to Mr. Lysfjord in connection with some meeting at the—it doesn't appear where— [693] but at least a meeting of some of the acoustical tile contractors with a Mr. Sidney Lewis of The Flintkote Company.

Now there is some other testimony by Mr. Waldron at pages 118, 122, 130 and 131 which is subject to the same objection, although that particular testimony falls short of even inferring a combination such as might be inferred from the testimony given in Mr. Lysfjord's version of this alleged meeting.

The factual situation is simply this: The witness has been permitted to testify concerning conversations had with an employee of defendant wherein that employee related certain conversations which had occurred a week or more prior thereto in the course of a meeting between another employee of defendant and two Flintkote acoustical contractors.

The admissibility of that testimony upon the foundation existing at that time, or at the present time for that matter, becomes clear upon a close examination of the rule which permits declarations of an agent to be attributed to his principal.

Wigmore points out the old case of *Franklin Bank v. Pennsylvania D. & M. S. N. Co.*, 11 G. & J. 28, 33, third edition of Wigmore on Evidence, Section 1078, page 120:

“ ‘But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an [694] act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer,

are not binding upon his principal, not being part of the "res gestae," and are not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done—not a part of the transaction, but only statements or admissions respecting it.' "

Fletcher in his treatise on corporations, states: "Declarations or admissions of an officer or agent of a corporation are not binding upon it, nor admissible in evidence against it for any purpose, unless they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his authority, or unless they were expressly authorized by the corporation, or have since been ratified by it."

Further:

"That the officer or agent, at the time he made the statement, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with, the business then pending." [695]

In addition, Fletcher points out:

"The statements must be of such a nature as to be part of the transaction. They must naturally accompany the act, or must be of such a nature as to unfold its character or quality."

Continuing:

"It is elementary that an agent cannot bind his principal by declarations which are merely his-

torical, and which have no connection with any transaction then being conducted by him with authority for his principal. 'The principle of the exclusion (of such evidence) is the same as obtains in the ordinary relation of principal and agent. The statements of the latter are inadmissible to affect the former, unless in respect to a transaction in which he is authorized to appear for the principal, and he has no authority to bind his principal by any statements as to by-gone transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties.' "

Now the cases are in unanimous support of that last [696] stated proposition. We have enumerated a number of them in our memorandum and I won't stop to read them all here. [697]

Now the evidence here shows that at the very most that Mr. Ragland was a sort of salesman who was attempting to have his superiors approve of plaintiffs as distributors or Flintkote tile. Mr. Ragland was present on many occasions, but exercised little or no authority or discretion on the question of whether or not to sell or refuse to sell tile to plaintiffs, or upon what terms or conditions sales would be made. It is clear, therefore, that plaintiffs failed to introduce evidence tending to establish even the first elementary requirement for attributing an agent's declarations to his principal; there is no proof that Mr. Ragland was authorized,

expressly or impliedly, to make the statements in question or even statements of that same general nature.

Further, there is absolutely no evidence as to the nature of the occasion when the declarations by Mr. Ragland are supposed to have been made. All he said, literally all he said, was that "Mr. Ragland came into the office, met me at the office." The witness, Mr. Lysfjord, did not relate a single transaction which occurred at that meeting with Mr. Ragland. For all the record shows, Mr. Ragland appeared at the Bell office, made the alleged statements, and left. Therefore, there is no evidence from which it reasonably can be inferred that at the time Mr. Ragland made those statements he was engaged in any transaction for his principal, The Flintkote Company. [698]

It thus appears that before an agent's statement may be attributed to his principal on the theory of the admission of a party, it must first be established that the declaration was within the scope of the authority conferred upon the agent by the principal. Defendant submits that the quoted testimony of Mr. Ragland was admitted in evidence before an adequate foundation is laid. Defendant further states that that defect was not subsequently cured, and accordingly, the testimony should now be stricken.

There is, of course, no evidence to the effect that the employee, Mr. Ragland, was a general representative of defendant. Defendant further contends that the evidence does not permit an inference of

such authority as would encompass the making of the statements which have been characterized as admissions. Plaintiffs have adduced very little in the way of evidence as to the scope of Mr. Ragland's authority. At page 340 of the Reporter's Transcript, Mr. Lysfjord testified that Mr. Ragland told him, "I will do everything in my power to get acoustical tile for you because I think you would do a good job for us but I can't tell you anything at this time one way or the other." Again, at page 341 of the Reporter's Transcript, Mr. Lysfjord testified that Mr. Ragland "called me one day and said that he had been able to interest his company in the fact that I would like to have acoustical tile, and if I would be interested he would like to [699] introduce me to a Mr. Baymiller." Other testimony which also shows the narrow limits of Mr. Ragland's authority, either as to him or in relation to other agents, appears in the Reporter's Transcript at pages 40; 340; 343; 349, line 3; 355, lines 2-5; 358, lines 9-14; 385 and 386.

When one considers the nature of the declarations it becomes clear that as a matter of law it can be said that they could not have been within the scope of Mr. Ragland's proved authority. The declarations clearly are narrative in form and historical in nature. They relate to a meeting held at least a week prior to their narration. Obviously they concern a "by-gone" transaction, and could have no relation to any pending transaction, for the evidence does not disclose that a transaction of any kind was in progress at that time. [700]

Accordingly, in view of the fact that the foundation was and remains inadequate to permit reception of the evidence on the principle of admissions of a party, those declarations are, as a matter of law, not competent admissions of The Flintkote Company.

The admissibility of the challenged testimony must stand or fall, therefore, on whether or not it comes within an exception to the hearsay rule, for undeniably it is hearsay testimony.

Preliminarily, it should be pointed out that the phrase "res gestae" as used in the quotations from Section 1078 of Wigmore on Evidence and the Moran case, has no relation to the doctrine of admissions. As there used the term refers to an exception to the hearsay rule. This point was made by the court in *Lane v. Pacific Greyhound Lines*, 26 Cal. 2d 582, 160 Pac. 2d 21 (1945) when it stated as follows:

"* * * Hence, a spontaneous declaration made by an employee may be admissible against his employer as an exception to the hearsay rule pursuant to the rule under discussion separate and apart from the question of whether it was made in the scope of employment. There may be situations where they are admissible under both theories or under only one or the other. As pointed out by Mr. Wigmore (VI Wigmore on Evidence (3rd ed.) §1756a), [701] in quoting from the dissenting opinion in *Snipes v. Augusta-Aiken Ry. & Electric Corporation*, 151 S.C. 391 (149 S.E. III. 115):

"There is quite a good deal of confusion of

thought and lack of discrimination manifest in the treatment of the subject of the admissibility of declarations of an agent. The lack of discrimination and consequent confusion of thought is demonstrated by the failure to differentiate between the declarations of an agent which are part of the *res gestae* and those declarations which were made in the course of his employment, and while the matter in controversy was actually pending. The declarations of an agent, which are shown to have been a part of the *res gestae*, are admitted, not because he was an agent, but because they come within the class of excepted hearsay evidence which fulfills the requirements of the *res gestae* rule; the declarations of one not an agent would be received under the same conditions. The declarations of an agent made within the course of his employment and while the matter in controversy was pending, are admitted, not because they were made as a part of the *res* [702] *gestae* but because they were made under the circumstances stated. They would be received weeks or months after the episode inquired into, provided that they were made under those circumstances. They may utterly fail of complying with the rule of *res gestae*, and still be admissible upon the entirely different foundation. It is misleading and incorrect, manifestly, to hold that, before the declarations of an agent can be received, they must be shown to have been both a part of the *res gestae* and within the course of his employment. They may have been either or both, and admissible for that reason.' "

Now, it was suggested at the time that this testimony was allowed in evidence that it was being offered as an overt act in furtherance of the conspiracy, and that the declarations were a part of the *res gestae* of the alleged conspiracy itself.

Now, these two suggestions appear to be but different facets of the same theory and apparently they proceed upon a theory that the declarations come within some exception to the exclusionary hearsay rule.

Upon careful analysis it appears that the evidence is not admissible upon any such theory. The declaration, [703] standing alone and not as a part of any transaction, as it must under the evidence, in no way furthered the objects of the alleged conspiracy.

Webster's New International Dictionary, Second Edition defines "furtherance" as:

"Act of furthering, or helping forward; promotion; advancement; progress."

Substantially the same meaning was given the phrase in *People v. Smith*, 151 Cal. 619, 626.

The court defined it as follows:

"A declaration, statement, or act of a conspirator to be admissible as in 'furtherance' of the conspiracy, must, as the word 'furtherance,' *ex vi termini*, imports, be an act, statement, or declaration which in some measure or to some extent, aids or assists towards the consummation of the object of the conspiracy."

Manifestly, as a matter of law it cannot reasonably be said that the statements themselves were

in furtherance of the conspiracy. On the contrary it would seem that revealing the conspiracy to the intended victims would tend to frustrate its objective.

Moreover, it has frequently been said that mere narrative declarations by co-conspirators are not competent for the reason that they are not ordinarily in furtherance of a [704] conspiracy.

Logan v. United States, 144 U.S. 263, 309, 12 S.Ct. 617, 632 (1892);

Mayola v. United States (C.C.A. 9th, 1934) 71 F. 2d 65, 67;

United States v. Food and Grocery Bureau of Southern California (D.C., S.D. Cal., 1942) 43 F. Supp. 966, 970.

As we have already pointed out, these declarations are pure narrative, entirely historical in character. Therefore, their utterance by Mr. Ragland could not in any sense have furthered the alleged conspiracy.

Defendant contends that Mr. Ragland's declarations cannot be considered as part of the *res gestae* of conspiracy. The term "*res gestae*" is not so elastic. Black's Law Dictionary, Third Edition defines the term as follows:

"Things done; transactions; essential circumstances surrounding the subject. The circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character."

Again, in *St. Clair v. United States*, the court

quoted with approval from Wharton on Evidence as follows:

“ ‘The “*res gestae*,” ’ Wharton said, ‘may be, therefore, defined as those circumstances which are the undesigned incidents of a particular [705] litigated act, and which are admissible when illustrative of such act.’ ”

The meaning of “*res gestae*” was fairly put by the court in *People v. Perkins*, 8 Cal 2d 502, when it said:

“(W)here it is the event speaking through the person and not the person telling about the event, * * * such declarations are part of the *res gestae* and admissible in evidence.”

It cannot be said that a conspiracy is an event or an act. Certain conduct, either acts or declarations, it is true, may be said to be in furtherance of a conspiracy, and declarations at the time of the acts may constitute a part of the *res gestae* of that particular act, but a narrative declaration as to past events, standing alone, illustrates nothing. It clearly is a case of a person telling about an event rather than an event speaking, in part, through a person’s declarations. It follows that the declarations by Mr. Ragland may not find their way into evidence under the guise of the “*res gestae*” of conspiracy.

Finally, it has been suggested that declarations are admissible on the ground that he, Mr. Ragland, is a conspirator. The suggestion was ambiguous and could have been any one or all of the following three possibilities: (1) that Mr. Ragland and The Flintkote Company conspired together; (2) that

Mr. Ragland conspired as an individual with [706] the acoustical contractors; and (3) that Mr. Ragland so conducted himself as an agent of The Flintkote Company as to be personally liable for his acts as agent of The Flintkote Company.

It is well settled that a conspiracy cannot exist between a corporation and its employee or agent acting as such. *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F. 2d 911.

There is no evidence that Mr. Ragland acted at any time otherwise than in his capacity as an employee of The Flintkote Company.

Nor is there evidence that Mr. Ragland conspired with any of the acoustical contractors in his individual capacity. Obviously, then, his acts and declarations cannot be admitted as acts or declarations of a conspirator on that theory.

There is no evidence that Mr. Ragland's position with The Flintkote Company was such that, or that Mr. Ragland did any acts which were such that, he would be personally liable under the anti-trust laws for his acts done as agent of The Flintkote Company. It is therefore obvious that Mr. Ragland cannot be considered as a co-conspirator on that theory.

Even if on some theory not heretofore considered, Mr. Ragland could be considered as a co-conspirator with defendant The Flintkote Company, his acts and declarations are not admissible to bind defendant The Flintkote Company until such time as the participation of defendant Flintkote is shown by [707] acts or declarations other than the acts

or declarations of the alleged co-conspirators. There is no competent evidence showing such participation.

It is further submitted that Mr. Ragland's declarations, which are inadmissible on any agency theory, are not rendered admissible merely by denominating Mr. Ragland a co-conspirator with The Flintkote Company. There is no evidence in the record that at any time Mr. Ragland acted or conducted himself otherwise than as an employee.

In conclusion, defendant submits that the challenged testimony of Elmer Lysfjord should be stricken from the record on the grounds that plaintiffs failed, as a matter of law, to establish a foundation which is adequate to permit the declarations to be attributed to The Flintkote Company, and that the declarations are entirely hearsay and come within no known exception to that rule.

Defendant The Flintkote Company maintains that absent the challenged testimony of Elmer Lysfjord there clearly is no substantial evidence which directly or indirectly tends to prove that The Flintkote Company knowingly participated in an unlawful conspiracy when it refused to sell acoustical tile to plaintiffs, even if it be assumed that such refusal resulted from pressure.

Accordingly, there being no proof of knowing participation in the conspiracy by The Flintkote Company, and that being the [708] only theory deducible under the evidence for finding that The Flintkote Company joined an unlawful conspiracy,

it follows as a matter of law that an essential element of plaintiffs' right to recover under the anti-trust laws has not been proved, and defendant's motion for a directed verdict should be granted.

Now, specifically as respects the motion to strike much of this, it would seem to us, would follow the same grounds, because if there is no connection with The Flintkote Company proved, to go to the jury, it follows just automatically that, there being no connection proved, all evidence of alleged acts and declarations of alleged co-conspirators are not binding on the company and must be stricken.

Therefore, we urge, in support of our motion to strike, not only that the hearsay testimony of Mr. Ragland and the hearsay testimony of Mr. Waldron, heretofore discussed, but that all testimony relating to alleged acts and declarations of alleged co-conspirators, specifically the testimony of Messrs. Waldron and Lysfjord regarding the alleged activities of the Downer Company, all documents and records introduced in evidence relating to those activities, all testimony of the alleged co-conspirators, the acoustical tile dealers should be stricken on the ground that those are all acts and declarations not occurring in the presence of The Flintkote Company, not binding on this defendant, until competent evidence has been introduced to prove the connection with The Flintkote Company. [709]

Now lastly and independently of the matters which we believe stand or fall on the same ground of course comes this matter of the admissibility of

damage testimony. And at this time we must renew our motion to strike all evidence of alleged damage sustained by reason of alleged failure to supply tile subsequent to July, 1952, when the complaint in this action was filed. And in support of that proposition we again rely on the Connecticut case, *Connecticut v. Frankfort Distillers*, 101 F. (2d) 79, and *Frye & Sons v. Cudahy Packing Company*, 243 F. 205.

We further move for a directed verdict on the ground that the fact of damage has not been proved in this case by any competent evidence.

Mr. Ackerson: Your Honor please, I have submitted two briefs which touch on these motions argued by Mr. Black.

Mr. Black stated a basic question here. I think the basic question in this Circuit, and in many Circuits, but certainly here in connection with the motion for a directed verdict is simply this: It is not is there substantial evidence in the record (which I think there is), but is there any evidence, any competent evidence in the record, from which the jury could infer that the defendant Flintkote aided, joined in, or abetted an illegal facet or aspect of the conspiracy with knowledge of that aspect.

I have argued in the briefs, and I think the cases are [710] clear, that in order to tie in a co-conspirator he doesn't have to know all about it, he doesn't have to know all his co-conspirators, nor does the plaintiff in a case like this necessarily have to name all the co-conspirators.

Mr. Black mentioned the fact that Mr. Ragland

apparently was a co-conspirator under the plaintiffs' theory because he conspired with The Flintkote Company, because he conspired with himself. Well, of course that isn't true. That isn't our position at all, your Honor.

Mr. Ragland is a co-conspirator as an agent of The Flintkote Company. And how do we know that? There is no act The Flintkote Company performed in this entire matter that wasn't performed in part by Ragland, in part by Baymiller, in part by Thompson.

Now let's skip over these preliminary conversations. Who terminated these plaintiffs? Certainly it was Flintkote. But there wasn't one scrap of writing from any other official of Flintkote or from any official of Flintkote. Flintkote acted through Ragland, Baymiller and Thompson. They walked out to the plant of my clients and they said, "We will no longer sell you tile." That is all there was to it.

How does Flintkote act, if Ragland, Thompson and Baymiller didn't have authority to act?

We certainly lost our line of supply because of the action of these "unauthorized, wholly disconnected subordinate [711] employees." I say that we start from there.

Now let's see what these statements are. We are not concerned here with whether or not Flintkote is liable on a contract, we are not concerned as such with ultra vires, technical ultra vires acts of an agent of a corporation. We are concerned here, your Honor, with circumstantial evidence of purpose and motive on the part of Flintkote in terminating this

source of supply. A part of that circumstantial evidence as to purpose, we contend, relates to the circumstances behind these protests of our plaintiffs' competitors.

Now I pointed to authority in the briefs, and I am not going to find it or repeat it, but Flintkote doesn't have to be benefited by this in order to show by circumstantial evidence that it aided and abetted this conspiracy to put my clients out of business for the purpose of eliminating their competition with their competitors. Flintkote doesn't have to be a competitor of my clients. Flintkote doesn't have to even benefit. But if we can believe, and there is no reason for not believing it, there is no contradiction to the statements in evidence at this time; the sole question is as to their admissibility. There is no evidence other than Flintkote did receive these protests and threats. Flintkote did shortly thereafter terminate the supply of my clients. Let's leave the hiatus between those two statements there.

That is the inference the jury must draw. But it is [712] circumstantial evidence. Mr. Black says, well, we haven't any written proof that Mr. Ragland had a right to make those admissions. Certainly we haven't. But we do have the undeniable proof that Mr. Ragland did, in fact, act for Flintkote and that is the only way Flintkote could act. Why could Mr. Ragland, along with Baymiller and Thomspon, the trio, terminate this source of supply without any written instrument from any other person than Flintkote and not be authorized to make an admission of circumstantial evidence of

coercion, which the plaintiffs claim and which is shown by the evidence to be the very purpose of the termination?

I think the cases are clear, and I think I have cited them, your Honor. Evidence is always admissible to show purpose and intent. You can't have a written admission on that. We can't show that through a written letter from the president of Pioneer-Flintkote to Ragland, that you have a right to go and tell this. That is an admission. An admission is always an admission of a past act. These past acts—and I think this is the only question involved—these past acts that Mr. Black objects to so strenuously are an admission, or constitute an admission, according to the plaintiffs, of the motive and purpose of Flintkote in having this conspiracy. In other words, the coercion that we say motivated it.

Now it is up to the jury to decide whether there is a connection there. I think they are clearly admissible. [713]

Let's take a little chronology here. I am going to refer to this one brief I have filed. There is no dispute about this coercion having been exercised upon Flintkote. There is no dispute about that. I think, as I stated, that Mr. Black said that he wouldn't seriously dispute that these competitors of the plaintiffs came down to The Flintkote Company and objected to their being in business. At least he admitted there were objections. [714]

The testimony shows beyond a doubt that there were objections.

Now what is the relevancy of that admission in this testimony? I don't care whether it is by admission of Ragland, it is an admission. Ragland could be, and it has been shown to be, what is ordinarily in criminal cases called an unnamed or unindicted co-conspirator. You have those people brought into cases who weren't even in the business, had no interest in it at all. They may have been a truck driver. And I can cite the case by Judge Wyzanski in Massachusetts within the last six months who handed down a decision involving the cranberry merchants there. And they convicted—they didn't convict them; they got a judgment—against the banker for co-operating with the cranberry association to injure this man's business.

The question then for your Honor, the basic question—and let's get back to it—is this: Is there any, any, admissible evidence in this record to go to the jury? I don't think there is any doubt about it. If we just limit it to the termination meeting—Mr. Black didn't mention that—and I assume it is obviously an overt act in furtherance of something. The question is whether or not there is evidence here from which the jury can infer that that termination was the result of Flintkote's tacit agreement with these contractors to restrict plaintiffs competition. [715]

So we start out with the admitted fact, they did object. Flintkote admits that. The testimony shows that.

We start out with the next fact, as I have stated,

that very shortly thereafter we were terminated in the manner I have stated.

We have the further testimony, your Honor, which is background and purpose again, that in these early conversations—and it isn't disputed so far—let Mr. Black dispute it later on. He has Messrs. Ragland, Baymiller and Thompson to bring in here. But these early meetings the fact that there would be this coercion was expressly called to these gentlemen's attention. They were forewarned.

I can't see any question as to the admissibility of that type of evidence, as well as Ragland's admissions.

Mr. Black hasn't mentioned the prior conversations, either. He hasn't discussed them at all. He has limited his discussions to Ragland's admissions to Lysfjord and to Waldron, by the way, that Mr. Newport, one of the competitors, president I believe or owner of Coast Insulating Products, met with Mr. Harkins and threatened to spend \$50,000 to boycott Flintkote's products if they didn't cut them off. That was one conversation.

If I conspired to commit a larceny or to commit a murder and subsequently I admitted that I was in the area of that crime, either crime, is there any doubt but what that would [716] be admissible, if there was any substantial—not even any substantial—any admissible evidence, to connect me with the other members of the conspiracy, anything from which an inference could be drawn? Of course it would be admissible [717]

We have more than that. We have the entire—

I am not going to review the whole matter, your Honor, I have set it out in my brief—we have knowledge, proven knowledge on the part of Flintkote from which the inference is inescapable that Flintkote knew that their tile was the only tile available to the plaintiffs.

Why all the negotiations if other tile were available? But it goes beyond that. The evidence shows that Flintkote distributes its tile to this party, that party, the other party; that Armstrong did the same thing.

When the evidence is analyzed, every available competent source of tile was in the co-conspirators' control.

The inference is further inescapable, so far as knowledge of Flintkote goes, your Honor, and based upon that premise of the evidence along that line, they had to know. I don't think this jury is going to miss the inference that when Flintkote terminated these plaintiffs, unless they have an independent business excuse, wholly disassociated from the inference of agreement, tacit or otherwise, with one or more of these acoustical tile contractors, unless they can eliminate that inference entirely they have been shown to have knowledge. And I don't think there is any doubt but what the inference could and should be drawn.

Now, I would like to refer, your Honor, call your Honor's attention to these cases in the last brief I filed [718] with your Honor yesterday. The amount of evidence that was required in the Moreno case and the other cases cited there——

The Court: The Moreno case was not an anti-trust case.

Mr. Ackerson: No, it was merely a conspiracy case. I don't concede that there is any difference in the general principles involved in a conspiracy case than an antitrust case, unless perhaps, under recent broadening, the antitrust decisions may be even broader than the criminal conspiracy cases.

The Court: You are going to take a little while longer and I suppose Mr. Black will want to reply.

Mr. Black: Briefly.

The Court: Do you think we ought to send the jury home?

Mr. Black: Yes.

Mr. Ackerson: Yes.

The Court: Is it agreeable to have the bailiff go up and tell them they are excused until Monday?

Mr. Ackerson: Yes.

Mr. Black: Yes.

The Court: The jury is excused until Monday at 1:30.

Mr. Ackerson: As I was saying, I don't believe there is any difference unless perhaps in a civil antitrust case, when we know, certainly, recent decisions have either broadened it or recognized past principles of conspiracy in a wider scope. [719]

You have, for instance, what has purportedly started out with your Interstate Circuit Theatre case a number of years ago down in Texas. There you had a dominant exhibitor who obtained unilateral contracts with each of the distributors.

There was no showing whatever that any dis-

tributors got together. There was no showing at all, for instance, that Columbia was threatened by Warners if they didn't come in, and yet the Supreme Court held the basic principle, that anyone who knowingly aids, abets, furthers, becomes a co-conspirator.

That case was based on pure unilateral action, which is a more difficult problem than we have here. The only question here, your Honor, is to judge the hurdle between the threat and the termination, if the jury infers from all the evidence, and the evidence includes more than that.

That was the purpose, your Honor, of introducing the fact these plaintiffs had a house here first. They quit a twelve or fifteen thousand dollar a year job and then deliberately came into Los Angeles and opened it up here first. Those are circumstances.

They put in a telephone here first. They signed a lease two or three weeks ahead of San Bernardino. There are a hundred pieces of circumstantial evidence in this case, your Honor, from which the jury could infer an agreement, tacit [720] or otherwise, with one or more of the acoustical tile contractors to throttle the plaintiffs' business.

Now, Mr. Black said, or, referred to the fact, and I have already averted to it by reference to the Cranberry case, but, as I recall Mr. Black's argument, he seemed to infer there could be no conspiracy inferred from the fact that Flintkote was coerced by one or more conspirators to restrain the trade of the plaintiffs.

I think that if Mr. Black meant that, that it is

so contrary to established law, it doesn't make any difference whether you willingly join. It doesn't make any difference whether you willingly or are coerced into it. I have cited two——

The Court: Wasn't his point there that his company cannot be bound by this evidence to have joined, but it was just pushed around by the conspiracy, that the conspirators came around and said, "Now, Flintkote, do this," and Flintkote yielded to its pressure, but did not merge into it.

Mr. Ackerson: Flintkote yielded and did what they were told, but they didn't agree to what they were told, was the way I get the gist of the argument.

I only cited one, your Honor, but there must be a score of cases on that point, but in the Paramount case, as I pointed out, that very question arose and it was probably true there. [721]

The Court: Well, I think grudging entry into a conspiracy is no excuse. Of course, it must be shown that Flintkote did enter the conspiracy, but if they entered it, it doesn't make any difference if they did so reluctantly or willingly.

Mr. Ackerson: Well then, I won't cover that, your Honor. So then we get down to the point of this single defense in this case, and it goes to the relevancy of, I say, all the evidence that Mr. Black has averted to, and that is this:

As I recall Mr. Black's partial opening statement, he won't deny this and he won't deny that, but he denies the conspiracy.

His defense, as I take it, from whatever is in the

record to date, is “that in spite of the protests we acted independently from sound business judgment, without any reference to any pressure or agreement with anyone else.”

Is that the purported defense, Mr. Black, in substance?

Mr. Black: It overstates it, and thereby becomes inaccurate.

Mr. Ackerson: You may correct that. In any event, the whole question, your Honor, boils down to this: Why?

Why did Flintkote do it? Because it followed along with the urgings of the contractors, through tacit agreement or through coerced agreement, or did it have a logical business motive; the sole purpose of the termination being a [722] logical disconnected business motive.

How do you disprove such a thing, your Honor? By circumstantial evidence. What the plaintiffs did, what Flintkote did and why it did it.

The admissions of Ragland, as to what the contractors did to Flintkote, certainly, bears in a very relevant way on the purpose of Flintkote's entire acts. It bears as a connecting piece of evidence that Flintkote, as an aider, abettor, joiner in a conspiracy, was to put these plaintiffs out of business.

I can't see from the evidence, and I don't think Mr. Black has stated any actual facts that would mitigate against the fact that Ragland was—in fact, that Ragland was, in fact, acting for Flintkote. And when Ragland continued to act for Flintkote—and we don't need to distinguish Ragland—there was

Thompson and Baymiller, too, but when they continued to act for Flintkote, from the time of the very first negotiations down to the effective overt act, then I don't think even Mr. Black will deny that is an overt act, of terminating the plaintiffs' supply of tile. [723]

Then I don't know what stronger circumstantial evidence you would need of an agent, unnamed, unindicted co-conspirator, if your Honor pleases, acting with authority and in behalf of the corporation.

Other than that, your Honor, I will rest on the basis of the authorities I have cited in the two briefs.

Mr. Black: I will be very brief, your Honor.

The Court: Take whatever time is required.

Mr. Black: It is not our position, the court please, that it is necessary, in order to prove authority of an agent, to show a resolution of the board of directors or that that act was a corporate act, done with the solemnity of making a basic agreement.

But we submit that there is absolutely no dissenting case on the books from the proposition that before a declaration of an agent, as to a past transaction which otherwise would be clearly hearsay, can be admitted, it must be proved that the agent was authorized to make that statement, or that he was then engaged in some transaction upon the authority of his principal, as to which that statement is a necessary part.

The only evidence in this case is that Ragland

came down, Ragland said. There is nothing else. There is no evidence whatever that Ragland was then engaged in any transaction, to which the narration of an alleged meeting between some acoustical tile dealers and another Flintkote employer [724] a week or so before could conceivably have any bearing on what purpose of the company was then being affected.

The cases we have referred to on this agency doctrine are absolutely in point, without the possibility of any distinction. Therefore, it gets down to this: That the only evidence that tends in any way to show anything in the nature of an agreement, concert or illegal methods in the case is this isolated bit of hearsay, based upon an alleged meeting, at which somebody is supposed to have said, "If Flintkote doesn't stop these people we will boycott them," and in which there was supposed to be a meeting of all but one of the Flintkote customers.

Now, the only other evidence of such an event, obviously, would be to produce the participant or one of them who was present.

There can't be any question but what Ragland's statement that this thing occurred last week is hearsay. And to get it into evidence, therefore, it must be in as one of the proper exceptions to the hearsay rule, namely, the authority, at least a statement by an agent with the authority of his principal.

There is no use reiterating those cases again,

because they are spelled out in our memorandum, the Court please.

Take away this inadmissible evidence as to this alleged meeting, and what do we have left? Nothing but statements [725] that there was pressure, that dealers complained.

Now, with that in the case you have a situation which is precisely parallel to the case of Johnson v. Yost, which we referred to before, but the applicable parts of which I wish to call to the Court's attention. That is 117 Fed. (2d) 53.

In that case the Court will remember that there was an admitted conspiracy of all the lumber dealers to drive out one of their number from the field, because he was a price-cutter. [726]

That conspiracy consisted of an agreement to put pressure upon the wholesalers to refuse to supply this plaintiff with his basic necessities for his business. Pressure was, in fact, applied on a whole group of wholesalers. They, in fact, yielded to that pressure. They cut off the plaintiff and were joined as defendants.

The court held that there was clear proof of a conspiracy between the dealer, the court held that you couldn't possibly infer from those facts alone enough to hold the wholesalers.

Now in the language of the opinion at page 61—let me begin at page 60, your Honor:

“* * * It is not alleged nor claimed by the plaintiffs that these defendants had anything to do with the organization of the alleged conspiracy.”

Now certainly not in this case is there any charge that Flintkote set up any group of acoustical tile dealers.

“The conspiracy charge against them is based on an alleged agreement not to sell to plaintiffs had between them and certain dealers.”

That is based upon an agreement among the wholesalers.

“It is not based upon any agreement between the defendants themselves. There is no direct evidence of any agreement between either of [727] these defendants and the dealers——”

Nor is there here. There is no direct evidence of any agreement between Flintkote and the other acoustical tile dealers to put the plaintiffs out of business.

“——but such agreement is sought to be shown by circumstantial evidence. It may be gathered from the pleadings and the argument of counsel based upon the evidence, that plaintiffs base their claim of proof of conspiracy upon the alleged facts (1) that these defendants simultaneously refused to sell to plaintiffs;”

That is the whole group of wholesalers refused to sell.

“(2) that they were deterred from selling by the pressure and threats of the lumber dealers; and (3) that they knew other suppliers were refusing to sell for the same reason.

“In the final analysis, the claim is that these defendants were coerced by defendant dealers, and as a result of that coercion they declined to sell plain-

tiffs. From this plaintiffs conclude that a conspiracy existed between all of the defendants. It must be borne in mind that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for [728] good cause or for no cause whatever. The Clayton Act itself specifically provides: 'That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.'

"The combination and conspiracy charged against the lumber dealers was a combination to deflect the natural course of trade. Such a combination is not only an unlawful invasion of the rights of the parties at whom the concert of action is aimed, but also of the parties who are to be coerced into refusing business relations with them. Assuming that plaintiffs were customers of the supplier——"

That is the wholesale group.

"——the combination of the lumber dealers was directed to preventing plaintiffs from having business relations with the supplier defendants."

So here the contention is that these acoustical tile dealers conspired to prevent plaintiffs from having further relations with the defendant Flintkote.

"This combination prevented these defendants from selecting their own customers. The decisions of the Supreme Court abound in expressions [729] to the effect that, 'The trader or manufacturer, on

the other hand, carries on an entirely private business and may sell to whom he pleases.' From the mere fact of refusing to sell to plaintiffs there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers. (Citing about 15 cases.)

“There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion. Here, it appears that a number of these defendants——”

That is the wholesale group.

“——had already refused to sell these plaintiffs even before the date of the alleged conspiracy. Others thought it bad business to sell them, and as plaintiffs themselves alleged, these defendants were coerced. Where there were two dealers in the same product at the same city, it was not thought good business to sell to both plaintiffs and the other dealer. In most instances, the other dealer had been handling the products before the arrival of [730] plaintiffs. In some cases, plaintiffs had invaded the trade territory of established dealers handling products of these suppliers, and that was at least distasteful to these defendants and there seemed to have been ample reason of a business character for the suppliers to refuse to sell to plaintiffs.” [731]

“In Federal Trades Commission v. Beech-Nut Company * * * the court held that the facts found went beyond the simple refusal to sell goods to persons who could not sell at stated prices. The court particularly pointed out that under the Sherman Act a trader was not guilty of violating its terms ‘who simply refused to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.’

“We have already referred to the rejected evidence. None of this was of such a character as to affect the liability of the supplier defendants. As to them, the proffered evidence was not material. There is here no substantial evidence introduced or proffered that these defendants have gone beyond the simple refusal to sell their goods for reasons which were sufficient to them and which appeal to one as having substantial basis in reason. While their acts in refusing to sell were similar——” [732]

In this case, of course, in the Yost case, there were a whole group of wholesalers that would do the whole thing, which is completely missing here.

“——yet a fair and logical inference from the evidence is that as pressure was brought to bear on them, they from business necessity and self-interest declined to sell to plaintiffs. As to some of these defendants there were other reasonable explana-

tions, but liability on their part could only result from a knowing participation in the combination of retail dealers. There is no evidence, direct or circumstantial, showing such knowledge. It was not enough to establish a cause of action against them to show that there was a conspiracy among the lumber dealers to prevent plaintiffs from securing supplies sold by this group of defendants, in the absence of evidence that these defendants knew there was such a conspiracy. They refused to sell plaintiffs because they feared such act would displease their other customers, causing loss of their business. They perhaps knew that other suppliers were refusing presumably for like reasons.

* * *

“So here, the refusal of the supplier defendants to [733] sell to the plaintiffs may have furthered the object of the conspiracy charged, but it did not prove that the suppliers knew of the conspiracy.

“It follows that the court correctly directed a verdict in favor of the supplier defendants. The judgment appealed from is therefore reversed as to the retail dealers, and the cause is remanded, with directions to grant plaintiffs a new trial as to said defendants, and as to the supplier defendants the judgment appealed from is affirmed.”

Now we submit that that case is on all fours with this one.

Mr. Ackerson: May I say just one word that was brought up by Mr. Black's remarks?

The Court: Yes.

Mr. Ackerson: I will make it very brief, your Honor.

This is in reference to—and I probably covered it; I merely want to state it a little differently—Mr. Black has said, as I understand it, that these conversation reported by Ragland were not acts in furtherance of the conspiracy. If that is right, I think it is obviously an error. They were the beginning of this conspiracy insofar as it affected the plaintiff's business.

I still don't know of any rule of law that says that a conspirator who would be bound by those acts later if he did [734] join later, couldn't admit the overt acts of a co-conspirator—I am talking about Howard, Coast and Newport and Gus Krause—so that if it is shown that there is sufficient evidence to show from which the jury can infer, any evidence from which the jury can infer, that Flintkote joined later, certainly the admissions of Ragland related to the acts of these competitors in the furtherance of the conspiracy and they initiated whatever pressure was made.

That is merely an added thought, your Honor. And along that line, the admission of this pressure, these overt acts by the plaintiffs' competitors, was reiterated at the termination meeting as part of the res of the termination meeting. Ragland admitted—I don't mean Ragland, Baymiller I believe it was—in response to Mr. Waldron's question of a terrific pressure having been brought, stated, yes, there was pressure, there was pressure.

I merely wanted to make that one added statement, your Honor.

There are a hundred cases that bear somewhat on this, *Clune v. United States*, clear back in 159 U. S. 590, *Eisenhower v. United States* 236 Fed. 842, *Reeder v. United States*, cited in the *Eisenhower* case, *Green v. United States*, a Ninth Circuit case, and many others, including the *Marino* case, though I think the rest of them have been added, but I appreciate the privilege of making this final statement. [735]

The Court: In connection with that *Marino* case, it contains practically every rule applicable to conspiracies.

Mr. Ackerson: Yes, it does. It sort of covers the field.

The Court: In fact, I had a stipulation from counsel in one case that the instructions to the jury on what constituted a conspiracy could be taken from the Court's definition of conspiracy in the *Marino* case, just using the *Marino* case language.

I think it would be provident to adjourn the formal proceedings and for the Court to review these cases and transcripts over the week end and rule on these motions Monday.

Mr. Ackerson: Very well.

The Court: So we will do that, and we will have a ruling on Monday at 1:30 when we reconvene.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 1:30 o'clock p.m., Monday, May 16, 1955.) [736]

May 16, 1955—1:30 o'Clock P.M.

Mr. Black: If the Court please, we received about 11:00 o'clock this morning this letter memorandum from Mr. Ackerson. I would like to have about three or four minutes to say something in reply to it, if the Court would hear me.

The Court: Yes?

Mr. Ackerson: I would like to have three or four minutes to say something basic, which I believe to be basic, Your Honor, which was not included in the letter.

The Court: You say it first and then Mr. Black can answer both at one time.

Mr. Black: Very well.

Mr. Ackerson: First of all, Your Honor, this Johnson case, I think we ought to analyze that a little bit, and that will lead up to the ultimate point I am going to make.

First of all, as I see that case, if you analyze it carefully, according to my opinion, Your Honor, it holds this, that the mere fact—and I quote “mere”; that appears on page 60 at the bottom of the last column—the mere fact of refusal may not give an inference to a conspiracy.

I would like, Your Honor, to have you think of this word “mere.” I might state now the main purpose of my letter this morning related to the admissibility of the evidence sought to be stricken, but since the Johnson case was mentioned [738] I would like to say a few words on that.

The first conclusion I draw is this, that the Court

merely held that evidence in that case did not rebut the proposition that individual, independent action was not possible. But here is the difference in the two cases: Mr. Black is urging that a person has a right to choose his own customers. We don't disagree with that at all. Of course he does. In the Johnson case, I believe if Your Honor reviews the evidence, and so forth, you will find that in accordance with the language on page 61 the Court said "there must be substantial evidence."

Now this is an Eighth Circuit Court ruling and I believe, Your Honor, that in this District there can be any evidence from which an inference can be drawn.

But any way the Court there said:

"There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion."

I don't think we are confronted with that situation here. [739]

To continue the quote:

"Here it appears that a number of these defendants had already refused to sell plaintiffs even before the date of the alleged conspiracy. Others thought it bad business to sell them and, as plaintiffs themselves allege, these defendants were coerced. Where there were two dealers in the same product at the same city it was not thought good

business to sell both plaintiffs and the other dealer. In most instances the other dealer had been handling the products before the arrival of plaintiffs. In some cases plaintiffs had invaded the trade territory of established dealers handling products of these suppliers and that was at least distasteful to these defendants.”

And we are speaking of distributor defendants now. And to continue:

“And there seemed to have been ample reason of a business character for the suppliers to refuse to sell the plaintiffs.”

Then the Court goes on as follows:

“In *Federal Trade Commission v. Beech-Nut Company*. 257 U. S. 41, the Court held that the facts found went beyond the simple refusal to sell goods to persons who would not sell at stated [740] prices. The Court particularly pointed out that under the Sherman Act, 15 USCA, Sections 1 to 7, a trader was not guilty of violating its terms ‘who merely refuses to sell to others. He may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not consistently with the fact go beyond the exercise of this right and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of the channels of interstate commerce.’ ” [741]

Now, under those facts, Your Honor, we have this situation, where the plaintiffs there moved into Grand Island, Nebraska, I believe it was, and they started a cut-rate store.

All the evidence, the type of evidence we are talking about, was admitted against the conspirators, held to be conspirators. The denials there were a matter of choosing a customer, not cutting one off that had been chosen, investigated and established. That is one point.

Now, there is a principle of conspiracy law, Your Honor—and I am sure Your Honor will recognize it—that a seller does have a right, not only to choose a customer, but he has a right to sit down and do nothing to stop a conspiracy. In other words, he doesn't have to take an affirmative act to stop the conspiracy, but he may not take an affirmative act to further a conspiracy. That is one point.

The other point is this, Your Honor: In the Johnson case it cites the Interstate Circuit case on one point, but the point is this, that stronger evidence being available and failure to produce it causes an inference that the stronger evidence would be detrimental to the defendant. It does not quote or cite the case for the basic reason the case stands for, and which has been followed in cases all the way down to the Theatre Enterprises case, which I am going to quote to Your Honor.

The Court: When? [742]

Mr. Ackerson: What is it?

The Court: When are you going to quote it to me?

Mr. Ackerson: Right now, if I may.

The Court: You asked for three minutes for something further and basic. I came in on Saturday

to read what had been cited to me on Friday, and spent substantially the day reading it.

I think these cases would be prepared by counsel before they ever came in to try them.

Mr. Ackerson: In the first place, Your Honor, they probably would have been but for the fact when Mr. Black stood up and filed his motions and I got them the same time you did. I didn't have a chance to think about his points and authorities. I didn't think he would have any that were substantial. I still don't think he has has.

But I haven't had a chance to think about them, except over the week end, either. I will try and be as brief as I can.

The Court: Let's hear from Mr. Black.

Mr. Ackerson: Very well.

The Court: All of these things should well have been treated in the trial briefs, which were due to be filed before the case began. They were due, I think under the Rule, ten days before. We didn't get them then.

The plaintiffs have relied largely on the testimony of [743] the plaintiffs themselves, and I should think that the plaintiffs' case could well have been analyzed fully and put before us before now.

Mr. Ackerson: We didn't know the defendant's position after numerous depositions, Your Honor, until we were in the middle of the trial, or it could have been.

Mr. Black: Well, I will try to say, in extenuation of our own position, if the Court please, a mo-

tion of this kind can hardly be made until the plaintiffs' case is completely in.

Until we know what it is in all of its ramifications, we are hardly in a position to discuss it, with fairness to the other side, because it all has to be in.

Well, all I wanted to say at this time, if the Court please, is to make two observations in connection with this memorandum of May 13th.

The *Johnson v. Yost* case is cited by counsel, in support of the proposition that admissions of corporate agents in that case, were received in evidence against objection, but the very nature of those admissions, received in that case, brings out to a high degree the difference between the factual picture in our case and the admissions that were received in the *Johnson v. Yost* case.

In that situation various agents, managers, officers, of the corporate defendants severally approached the plaintiffs [744] and individually announced their company was going to cut these people off if they quit dealing and were going to see to it that they didn't get any cement and direct threats of that nature.

It was argued that these particular agents didn't have authority to make those declarations. The Court points out, in discussing the evidence, as follows:

“Even though the making of declarations——”

I read from page 59, Your Honor.

“——may not have been expressly authorized by the principal, yet if they were ordinary incidents of the position which the agent occupies, authoriza-

tion will be implied. A person in a managerial position will be called upon, in the performance of his duty, to adjust controversies and to make and receive admissions. All of these things must be done or performed by someone, and a corporation must ultimately act through an individual. Each of these agents was charged with the continuous management of the business of his principal. The jury may well have concluded that the local managers for their localities were general managers. The subject of the conversations related in a vital way to the successful prosecution of the very business entrusted to them. As the [745] record now stands, we are of the view that they were acting within the scope of their apparent authority, and their declarations were binding upon the principals.”

Now, let's review the facts just one moment to see who these agents were.

“ ‘The declarations relied upon as against the Yost Company were made by Martin and Rurup, the Local yard managers at Grand Island and Hastings, respectively; those concerning the Sothman Company were made by Goehring, the yard manager. The statements concerning the Geer Company were made by Russell Geer, its president and general manager, and the statements concerning the Chicago Company were made by Lawrence Simpson, its vice president and general manager.’ These statements were all made in the course of conferences concerning the business of the corporations. All of these agents were general agents in charge of business, either locally or generally. As said by

the New York Court of Appeals in Lowenstein, 'Where an entire business is placed under the management of an agent, the authority of the agency may be presumed to be commensurate with the necessities of the situation.' " [746]

So the Court there points out all of these people were in managerial capacity. That they were all at the very time engaged in the transacting of business for the company and the corporate authority would be necessarily presumed from the positions they held.

Now, one final sentence, before I leave the Yost case. Counsel has just stated today that one distinction between that case and this is that there the parties had not been theretofore engaged in a course of dealing with the plaintiffs. Well, that just isn't so.

In the case, at page 59, you will find a quotation thus:

"In 1934, the Missouri Portland Cement Company advised plaintiffs that although business with them 'has been very satisfactory so far as we are concerned,' yet due to complaints from the dealers in Grand Island and Hastings, future business would have to be discontinued and all future orders were declined."

So that the case proceeds on the very basis that they were expressly told that they were going to stop dealing with them, because other people were complaining about it, and for the business reason of dealing with the customers, where they got the most business, they cut these people off. [747]

It was held that that was not a conspiratorial act and therefore that evidence alone had no tendency to show a conspiracy, and a directed verdict was sustained by the upper Court.

Now counsel also refers to Pan-American Petroleum Company v. United States, 9F(2d)—the letter miscites the case inadvertently, the letter says 161, the correct page is 761. It was the famous Doheny case in which, as against Pan-American Petroleum Company Judge McCormick admitted the statements made by Mr. Doheny before the Congressional investigation, and it was claimed that there was no authority proved on the part of Mr. Doheny to make those statements on behalf of the corporation.

Judge Gilbert in the opinion says, at page 769:

“There can be no question but that the declarations of an officer or agent of a corporation, even though they consist of a narrative of past facts, may, under appropriate circumstances, be admitted in evidence against the corporation, nor does the admissibility of such declarations necessarily depend upon the length of time that has elapsed between the occurrence and the declarations. Clearly if any officer of the defendant corporations was authorized to bind them by declaration after the event, it was Doheny. As president [748] of both companies, he had negotiated the agreements and had executed the same. The scheme to pay for tankage facilities, construction and fuel oil by Government royalty oil originated with him and Fall. He was the dominating figure and the administrative officer

by whom the business of the corporations was conducted, and acts done by him within the scope of the corporate powers were presumably duly authorized. At the time when the declarations were made, there was pending transactions between the plaintiff and the defendants to which the declarations were pertinent, for the contracts and leases were in active operation, and their validity was being investigated by the Senate committee. The defendants were interested in vindicating the contracts, and it was to their interest to show that the \$100,000 transaction was a purely personal one, and in no way related to the procurement of the contracts. The declarations were also against the interest of the declarant, and no other means of obtaining the evidence were available to the plaintiff. Among the cases tending to support the ruling of the trial Court are *Chicago v. Greer*, 9 Wall, 726 (and a long list of other cases supporting the [749] authority in that decision).”

Now we submit, Your Honor, that that is now a comparable situation to this. There was the president of both corporations, and the very purpose of his appearing was in the business of the company and in explaining these transactions before Congress, and Congress, and quite properly the Court admitted those declarations against a claim that they were not made with authority by the corporations that Doheny at the time represented. As the Court points out, he was the alter ego of those companies, president of both of them, and was the very man to whom the entire business was entrusted.

Now in this situation on the contrary we have the alleged admissions of a salesman in the company at the time when it was not proved to be any transaction which he was then attending to on behalf of his company, and they related to a narrative of past events.

We submit that there is just no evidence of authority on the part of Mr. Ragland to make the alleged statements, and if they are stricken that nothing remains in the record from which a prima facie showing against the defendant may go to the jury.

The Court: Considering all the evidence before the Court, the motions to strike are denied and the motion to dismiss is denied.

Bring in the jury. We will stand in recess until they [750] come down.

(Short recess.) [751]

The Court: Call the case, Mr. White.

The Clerk: 14,350, Lysfjord v. The Flintkote Company, for further jury trial.

Mr. Ackerson: Ready for the plaintiff.

Mr. Black: May it please the Court, Mr. Ackerson, and ladies and gentlemen of the jury, the time has now arrived for the defendant to make its opening statement of the matters which it is expected it will prove in the defense in this case.

I wish to make the same admonition made by Mr. Ackerson, that what I tell you in this connection is not evidence. That will, of course, be confined to

the oral testimony and the documentary proof which will come in on the case.

My statement, therefore, is merely a summary of what we expect to prove as our version of the facts in this occurrence. I think it has been sufficiently pointed out that The Flintkote Company is a manufacturer. Perhaps it is not entirely clear. It does not do any installation business itself.

It is an acoustical tile contractor. It sells its products to the contractors. It manufactures various products, roofing materials, paper boxes, asphalt emulsions, insulating board, wallboards, and so forth. Acoustical tile is only one of the many products that are produced by this defendant.

This particular commodity, so far as the product handled by the defendant Flintkote Company is concerned, is a [752] tile manufactured from sugar cane fiber in the Hawaiian Islands.

The Flintkote Company went into this business in 1948 or thereabouts, when it acquired a company called Canex, which at the time was engaged in the manufacture of this type of acoustical tile.

When Flintkote started into business in this Los Angeles area, its policy at the outset was to sell it to any contractor who wanted it. This policy proved quite unsatisfactory.

It was decided thereafter to sell it only to a limited number of approved contractors. The first outlet chosen by the defendant Flintkote Company was the L. D. Reeder Co.

Then a little later that company suffered some

financial difficulties and The Flintkote Company terminated its relations with that company.

One at a time, the R. W. Howard Company, the Sound Control Company, and the Coast Insulating Company became Flintkote accounts, and these three concerns were the only ones in the local area that were handling the Flintkote line of acoustical tile at the time with which this litigation is concerned.

Flintkote decided to limit its outlet to three of the contractors, not by reason of any agreement with these contractors, but because these three were giving The Flintkote Company adequate local distribution.

This policy was being maintained at the time involved in [753] this litigation. And about May, 1952, Sound Control was replaced by Acoustics, Incorporated, as the third Flintkote contractor in the area.

It will be shown that various proposals were made to the Flintkote people, from time to time, to add additional accounts in the local area, and the Flintkote people universally rejected these applications, on the basis that the three distributors were adequately taking care of Flintkote's requirements in the local area.

One of the witnesses, whose name you have heard a great deal in the course of this case, is a Mr. Robert Ragland. He was employed by The Flintkote Company as a specialty salesman, at the outset, for fiberboard products, which did not include acoustical tile. [754]

He was later transferred to the acoustical depart-

ment and was given a position as a sales promoter. Mr. Ragland knew the plaintiffs in this case. He had worked together with them in the Shugart Company some years prior.

Along about the late summer or fall of 1951 Mr. Ragland was approached by Mr. Lysfjord with respect to the possibility of getting a Flintkote connection. The evidence will show that Mr. Ragland said that Flintkote was already represented adequately in the local area and that he didn't think there was much, if any, possibility of getting a connection for local distribution. He suggested the possibility of Phoenix, Albuquerque and Denver. He said he had no authority to make any decision, but promised Mr. Lysfjord that he would make inquiries.

He did so. There were several later conversations between Mr. Ragland and Mr. Lysfjord. Mr. Ragland recommended Lysfjord to the company as he knew him to be a competent workman and a competent salesman and thought he would be of some value to the company if they could find a spot where his abilities could be put to use.

He was finally able to interest Mr. Baymiller, Mr. Browning Baymiller, who is the assistant southwest district sales manager in the Flintkote office, Mr. Ragland's immediate superior.

So a luncheon conference was arranged in the fall of [755] 1951 at the Manhattan Supper Club. Mr. Lysfjord, Mr. Ragland and Mr. Baymiller attended.

The discussion at that meeting was quite general

and in the nature of an exploratory operation, simply to size up the situation and to give Mr. Baymiller a chance to see Mr. Lysfjord and to talk to him and to learn something about what sort of a person he was.

Mr. Baymiller stated unequivocally at that conference that there was no opportunity for plaintiffs to operate in the Los Angeles area, but that some outlying territories might be available. It is probable that there was some further calls by Mr. Lysfjord and perhaps also by Mr. Waldron at the Flintkote office following this first luncheon conference, but the next meeting of any significance was another luncheon meeting some two weeks or thereabouts later, again at this same restaurant, the Manhattan Supper Club.

This time it was attended by Mr. Thompson. Mr. Thompson is the southwest district sales manager, building materials division, and Mr. Baymiller's immediate superior. This luncheon was attended by Mr. Thompson, Mr. Baymiller, Mr. Ragland, Mr. Lysfjord and Mr. Waldron.

The plaintiffs presented evidence or information bearing on their ability as salesmen and as applicators and their experience was reviewed. Again at that meeting it was definitely stated nothing was available in the Los Angeles area, but [756] that the San Bernardino and the Riverside area were not being adequately covered in Flintkote's estimation and that as they had no arrangement with their present distributors that in any way gave them exclusive rights in that territory, Flintkote was free

to put anyone into that territory that they felt was not adequately then being represented, and that the San Bernardino-Riverside area was one of those spots where additional close local representation might be profitable both to Flintkote and to the contractors.

Quite a bit of discussion ensued as to what sort of an operation could be established in that field.

At that meeting one of the plaintiffs mentioned the possibility that there might be contractors in the Los Angeles area that they only would be able to interest in getting a job and could be reasonably assured of such work over any other bidder on the line because these particular contractors might know these plaintiffs and wished to give them the jobs if it was possible to do so and there weren't an actual series of formal bids where the low bidder would necessarily have to get the job, but where it was a negotiated job, that these people might well have sufficient influence with these particular contractors to get the work. And it was asked whether in that situation it would not be permissible for the plaintiffs to take those Los Angeles jobs.

Mr. Thompson said, in answer to that, "Well, if such a [757] situation comes up and there is a picture of that sort, we will consider it, but it must be especially considered on an individual basis because we repeat that there is no possibility of you people operating generally in the Los Angeles area."

It was arranged at that meeting also for financial data to be prepared and to be presented to the company, and it was agreed that these matters

would be taken up with Mr. Harkins who had the final decision.

Mr. Frank Harkins was at the time the manager of the building materials division for the Flintkote Company in the eleven western states and he was the man who would have the final decision as to the choosing of outlets of this sort for the sale of acoustical tile.

So a meeting was arranged between the plaintiffs and Mr. Harkins at the Flintkote office. At that meeting Mr. Thompson was present, Mr. Ragland was present, Mr. Baymiller was not present. He was out of town at the time that meeting took place.

Mr. Harkins reviewed the position generally with these plaintiffs and stated at that time that they were quite gratified to have somebody who was prepared to go into the Riverside-San Bernardino area and to promote aggressively the interests of The Flintkote Company in that territory, but he asked the plaintiffs if they thought there was sufficient business in [758] that area to support them.

They assured him that the territory had been examined tentatively by them and that they were confident they could make a go of it in the area.

Mr. Harkins then, in effect, accepted the two plaintiffs as Flintkote distributors, suggested that they talk to the credit manager, which was done. A Mr. McAdow interviewed them, and the meeting thus terminated with the understanding that the plaintiffs would be Flintkote products outlets in that particular territory.

Then sometime shortly thereafter plaintiffs

brought to Mr. Ragland an order for their first shipment of tile. Mr. Ragland had previously discussed the matter with them, had given them his views as to what material would be appropriate for their initial order, and when the order was brought to him at the Flintkote office he examined it and received it. They went to lunch together on that occasion.

Now the first shipment was delivered to San Bernardino on January 17 or January 18. Mr. Ragland and another Flintkote employee, Mr. Heller, apparently had to be in San Bernardino on other business but they chose that date to be there as well because they were advised that the first shipment was arriving and they thought it was appropriate to be on hand and see to it that it arrived in good order and condition and that the plaintiffs were set up to receive it. [759]

So they went out there and, as the shipment had arrived and the trucks came to the place of business, Mr. Heller and Mr. Ragland discussed the matter with Mr. Waldron and everything seemed to be in order, and they also had lunch together on that occasion.

Now sometime in the early part of February the Flintkote people received a complaint from a Mr. Krause of the Coast Insulating Products, and also about the same time from a Mr. Howard of the R. E. Howard Company. In general the basis was that here were some people that were in the Los Angeles territory that Flintkote hadn't notified either Howard or Krause about adding another account

in the area, and they didn't think that was a very handsome way to treat them when they had been dealing all this time on the basis that there were three accounts in the area here, and how come adding another one here? What is the idea back of this? What are you doing this for without notifying us? Do you think that is a fair way to treat us? Mr. Krause apparently became rather vehement on the subject.

Now this was the first notice to the Flintkote Company that the plaintiffs were operating in the Los Angeles area. Mr. Ragland was away at the time. He at that time was up on a trip from San Francisco to Portland and Seattle on some company business, and Mr. Krause talked by telephone to Mr. Lewis of the Flintkote Company. [760]

Mr. Lewis is an assistant in the sales department in this division. Mr. Krause did not come to the Flintkote office.

Mr. Lewis replied to Mr. Krause that he would report the matter to his superiors, that Messrs. Lysfjord and Waldron were supposed to be in the San Bernardino-Riverside area, and that it was a surprise to them that they were operating in Los Angeles and, if it were true, the matter would at least be investigated. But Flintkote would determine for itself what its policy would be.

Later Mr. Baymiller and Mr. Heller called on Mr. Krause and then on Mr. Hoppe and on Mr. Howard, telling each of these people that this situation would be looked into by Flintkote, and that they would make their own decision about it. There were no

threats. There was no suggestion of a boycott. There was no general meeting. There was no agreement by any of the contractors or by Flintkote as to what action would be taken.

Upon Mr. Ragland's return from Seattle, Mr. Harkins asked Mr. Ragland to investigate these and various other rumors that had come to Flintkote's attention about the activities of the aabeta company. [761]

Mr. Ragland proceeded to make the investigation. He was shown a card which somebody had referred to The Flintkote Company, indicating a Los Angeles telephone number, and no address appearing on it. But the telephone number appeared, and on calling that number Mr. Ragland made contact with the company.

There is some doubt as to whether this happened after he first made a trip to the area and couldn't find the location and came back and got this number. But, in any event, he ultimately made the telephone contact.

He came down there and found the plaintiffs at the Atlantic Boulevard address. He told them that they were, of course, not supposed to be operating in the Los Angeles area.

He also indicated that he had no authority to deal with the situation, but he had merely been sent down there to make an investigation. That whatever the company did about it would have to be decided by his superiors. At the same time there was a rumor that the company was operating another Los Angeles address. That turned out to be another

aabeta co. and had no connection with the plaintiffs' operations.

Mr. Ragland then wrote a report on the situation to Mr. Harkins, dated February 15, 1952, reviewing the results of his inquiries.

Very soon thereafter there was a general conference in the Flintkote offices, which Mr. Harkins, Thompson, Mr. [762] Baymiller and Mr. Ragland were present at, and they reviewed the facts that were disclosed by this investigation.

Mr. Harkins decided that these plaintiffs could not be trusted to keep their word, and that he felt they should be terminated as a Flintkote account. He suggested that Mr. Thompson himself, along with Mr. Baymiller and Mr. Ragland, go down there and transmit this decision.

So a meeting was arranged at the aabeta co. office Mr. Ragland, Mr. Baymiller, Mr. Thompson were present and the two plaintiffs were also present. Mr. Thompson did most of the talking.

It was a very brief meeting. Mr. Thompson explained to them that it had been decided that they could no longer supply them with tile, because he felt that, in violation of their agreement, they were doing business in the Los Angeles area.

At that meeting the plaintiffs did not deny the proposition that the plaintiffs were not supposed to be in the area. There was no mention of pressure by other contractors at that meeting.

The Flintkote people decided that, as a matter of fairness to the plaintiffs, they would at least take care of their outstanding accounts for application of

tile and gave them a reasonable period in which to interview contractors with bids that were outstanding. If they were outstanding, if they [763] could present evidence, that they had definite commitments to contractors, even in the Los Angeles area, that such tile would be supplied to them.

This arrangement was made and the tile that was required was supplied. One order was not filled, and that order was a mere resale of materials.

It had nothing to do with an application contract and the company felt that they were not obligated to supply tile in that situation. It was just a purchase for immediate resale to another person.

Now, there was never any agreement by The Flintkote Company, the testimony will show, as to the number of distributors. That Flintkote did not participate in any combination with anybody or any conspiracy in connection with this termination. That they made no agreement to terminate these people, expressed or implied, with the other distributors. As to whether at that time or earlier there was any combination by these contractors, to allocate bids between themselves or to come to an agreement on prices, that they would charge, Flintkote has no knowledge.

The dealers with whom Flintkote does business will testify that they never participated in any such scheme. And certainly, the Flintkote people will deny any participation in such, or any other conspiracy, if it ever existed.

Finally, we expect to call a certified public ac-

countant to [764] testify as regards certain matters developed from the plaintiffs' books and records.

That, ladies and gentlemen, is the general outline of the case we expect to present in the defense of this suit. I appreciate your attention, and again I admonish you what I have said is nothing but my statement and is not to be accepted by you as evidence in the case.

We are ready to call our first witness. I will call Mr. Robert Ragland.

ROBERT EUGENE RAGLAND

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated. Your full name, sir?

The Witness: Robert Eugene Ragland.

Direct Examination

By Mr. Black:

Q. Mr. Ragland, I would like to admonish you, if you please, to talk loudly and distinctly so every one of the jurors can hear everything you say, and if you do not understand my questions, do not hesitate to ask me what I said.

Be sure you understand my questions and those Mr. Ackerson will later put to you, before you answer them.

What is your present occupation?

A. I am with the Coast Insulating Products

(Testimony of Robert Eugene Ragland.)

Company [765] in the capacity of a sales promotion man.

Q. Were you formerly employed by The Flintkote Company, the defendant in this action?

A. Yes, I was.

Q. When did you leave the employ of The Flintkote Company? A. April 1, 1955.

Q. Do you recall when you started your employment with The Flintkote Company?

A. That was February 1, 1951.

Q. And in what capacity did you start your work with that company?

A. I was taken on as a—the general title was sales engineer—field service engineer, excuse me. But the purpose of that job, in my particular case, was to promote the general line of insulation board products.

Q. In that connection, did you deal with acoustical tile? A. No, sir, I didn't.

Q. Did you retain that same position during the entire time you were employed by The Flintkote Company?

A. No, I didn't. I was given the job of sales promotion for acoustical tile about June 1st of that same year, 1951.

Q. Did you retain that sales promotion job in the [766] acoustical tile department until you left Flintkote's employ? A. Yes, sir, I did.

Q. Was there any change in your duties during that entire period? A. I can't recall any.

Q. So that it is a correct statement, is it not, that

(Testimony of Robert Eugene Ragland.)

in the period, say, between the summer of '51 and March of '52, you were substantially in that same capacity? A. Yes, sir.

Q. What experience had you had prior to your employment with Flintkote in the acoustical tile business?

A. I had had approximately four and a half years' experience in the acoustical tile field as a representative of acoustical tile applicator.

Q. What company was that?

A. Harold Shugart Company.

Q. What line of tile did they handle?

A. They handled The Celotex Corporation tile.

Q. Did your work take you into the Los Angeles area during that experience?

A. At times it did, Mr. Black. I had several positions with the Shugart Company. My first experience with them, after my discharge from the Army in 1945, I went to work as a member of their application crew.

I was on work crews, putting up the material, and it [767] was more the mechanical end of it. Later I was taken into the sales department as a junior salesman, to actually pursue the acoustical jobs from the customer point of view.

Q. In that connection did you meet the plaintiffs while you were in that——

A. Yes, I did, both the plaintiffs were foremen for the Shugart Company, on the Shugart Company crew. I worked for each one of them on various jobs many times.

(Testimony of Robert Eugene Ragland.)

Q. How frequent were your contacts with Mr. Lysfjord and Mr. Waldron?

A. Well, as far as working on their respective jobs, I would say that Shugart possibly had 20 foremen. I would be assigned to one of their jobs maybe every six weeks.

Q. Did that contact develop into a relationship which took you beyond your business contact? Did you have any personal or friendly relations—

A. Yes, sir, it did. We seemed to all have an interest in fishing and we—I can recall several fishing trips we took together, and Christmas parties we were at together. And some card games after work at Mr. Waldron's house, I believe.

Q. Did you keep up that personal relationship during the time you were employed with The Flintkote Company, with the plaintiffs?

A. Yes, sir. [768]

Q. What was the circumstance when the first discussion took place between you and either of the plaintiffs, with respect to the acquisition of a line of tile from The Flintkote Company, if you recall?

A. I am pretty sure that must have taken place shortly after I entered the employment of The Flintkote Company.

It was more of a dream, I think at first, when it was proposed by Mr. Lysfjord. He had left—he and Mr. Waldron both had left the Shugart Company and had taken jobs as salesmen for, I believe it was, the Coast Insulating Products Company.

(Testimony of Robert Eugene Ragland.)

They approached me by telephone and I recall several luncheons we had, with the intention or the over-all idea of securing some of the Flintkote tile, so they might establish their own business.

Q. What did you say, in general, to this inquiry, if you remember?

A. Well, at that time, due to these first contacts that I speak of, Mr. Black, I was not in a position to tell them one way or the other, because I had nothing to do with the acoustical tile.

Q. Later when you got into the acoustical tile department, did you talk to them again on the subject?

A. Yes, sir, I did.

Q. What was said by you, if you remember? I don't [769] expect you to recall every detail of every conversation. But just what, in general, was the nature of the discussion?

A. After I was assigned to this acoustical tile duty by the company, it was my purpose to move through the Pioneer Division, which comprises the 11 Western States, for The Flintkote Company, and establish persons that might be interested in selling our acoustical tile. Persons that knew something about the acoustical tile business and had some money to establish their own business.

In my brief rounds at this time—you understand, I was just a junior man—it seemed to me we were very weak in some of our outlying territories, namely, Albuquerque, El Paso, Phoenix, Seattle, and Denver.

My thoughts to those questions at that time, that

(Testimony of Robert Eugene Ragland.)

you originally asked me, were to steer these two men, if possible, to some of these districts I have just mentioned.

I stated that we were adequately represented at the time in the Los Angeles district by our three current accounts. [770]

Mr. Ackerson: May we have the time and place and the basis for this, Mr. Black? I don't know whether it occurred February, '51, or when.

Q. (By Mr. Black): Are you able to place with some accuracy the time of this discussion?

Mr. Ackerson: And who was present, and so forth.

Q. (By Mr. Black): And which of the plaintiffs were present or whether both of them were?

A. Very seldom did I ever see both of the plaintiffs together at this time anyway. Mostly it was a discussion with Mr. Lysfjord.

Q. And at what time do you refer to now when you are talking about the Los Angeles territory being adequately represented?

A. Shortly after I had occasion to promote this acoustical tile. Let's say the month of June, 1951.

Also at this time I had taken, or I was taking a business course in salesmanship down at the University of Southern California night school, in which I interested both the plaintiffs, and they subsequently came down there with me. And there was an occasion when we were both together, or all three of us were together, and that discussion very likely could have taken place at any one of those meetings. [771]

(Testimony of Robert Eugene Ragland.)

Q. What, if anything, was said to you with respect to the possibility of operating in these outlying territories?

A. It seems to me that there was a slight interest shown in the Phoenix district.

Mr. Ackerson: May we have the people present, the place and the time, if possible?

Q. (By Mr. Black): Can you remember?

A. I don't remember.

Q. Who said what?

A. I was the one that tried to get them over to Phoenix, and I recall them telling me——

Mr. Ackerson: I would like to have the conversation without a formal objection. What did you say and who did you say it to?

Q. (By Mr. Black): Yes, if you are able to say whether either or both of the plaintiffs or only one, which one, please do so.

A. Mr. Lysfjord expressed interest in a possible Phoenix operation.

Mr. Ackerson: What did he say? Will you take care of that, Mr. Black?

Mr. Black: I will try to.

Q. You see, the point is, Mr. Ragland, a witness is permitted to testify as to the substance of what somebody [772] said to him, but whether he shows interest or displays indifference is your conclusion, you see. So as nearly as possible—we don't expect you at this late date to reconstruct the words verbatim—but as nearly as possible confine your testimony when we are dealing with conversations to the

(Testimony of Robert Eugene Ragland.)

substance of what was said and who said it. So try, if you can, to reconstruct that discussion in terms of the substance of what was said.

A. Well, in summation I proposed to Mr. Lysfjord the Phoenix area, and he said that he would take a trip to Phoenix, which he reported to me that he did, over a week end.

The result of that trip, he told me, was that he didn't get too much out of the trip because it happened to be on a Sunday and things were pretty well closed in that city, and he wasn't too enthusiastic about Phoenix.

Q. Did you initiate any discussions with your own superiors in the Flintkote Company with respect to the possibility of establishing the plaintiffs in some way with the Flintkote Company?

A. No, sir, I didn't at that time.

Q. Did you at a later date?

A. Yes, sir; I did.

Q. What were the circumstances under which that was done?

A. I told Mr. Baymiller that they were two [773] of my friends that had some experience in the acoustical business, and that they had a little money and wanted to establish a dealership for us some place.

Q. And were you able to arrange any kind of a meeting with Mr. Baymiller and the plaintiffs or either of them?

A. After a time, I was, Mr. Black. The Flintkote Company, in my experience, had never moved too fast on any recommendations that I made——

(Testimony of Robert Eugene Ragland.)

Mr. Ackerson: I am not going to move to strike the conclusions or anything, but I would like to have Mr. Black ask his client to state facts.

Mr. Black: I think that that is probably the fact, that they didn't move too fast, but——

The Court: Let us get at the conversations. Tell us what was said. Do not give us a general conclusion as the result of what was said.

Q. (By Mr. Black): What, if anything, was done in the way of a meeting?

A. Well, eventually I was able to get Mr. Baymiller to a luncheon with Mr. Lysfjord.

Q. About when did that take place?

A. As near as I can recall, that was in the month of September.

Q. 1951? [774] A. Of 1951.

Q. And where was the meeting held?

A. At the Manhattan Supper Club on South Western in Los Angeles.

Q. Who else was present?

A. Mr. Lysfjord, Mr. Baymiller and myself.

Q. What position did Mr. Baymiller hold at that time?

A. Mr. Baymiller was an assistant sales manager to Mr. Thompson for the Flintkote Company in their southwest district.

Q. As near as you now remember, will you please state what was said at that meeting and by whom?

A. Mr. Lysfjord presented himself to Mr. Baymiller as a possible applicator. He stated that he felt

(Testimony of Robert Eugene Ragland.)

that he had experience enough to adequately handle a dealership in this acoustical tile business.

Mr. Baymiller again having been from the Phoenix district for many years, tried to interest Mr. Lysfjord in going to that section of the country.

Mr. Ackerson: May we have the conversation?

Q. (By Mr. Black): Try to keep it on the level of what he said or the substance of what was said instead of "tried to interest." State what he said, if you can. What did Mr. Baymiller say in that connection? [775]

A. Mr. Baymiller said that under no circumstances could Lysfjord operate in the Los Angeles territory. We had at that time three other contractors that were established in Los Angeles, had financial backing, namely the Reeder Company, Acoustics, Inc., and the C. F. Bolster Company. That matter of Los Angeles was dropped after that statement.

Q. At that time were those three companies handling Flintkote products?

A. No, sir, none of those companies had Flintkote at that time. [776]

Q. I don't know that I understood the statement then. What was——

A. Mr. Baymiller had told Lysfjord to forget all about Los Angeles, because we had adequate representation with our three current accounts, and if we could induce our management to take on a fourth account he would be No. 5 in line.

(Testimony of Robert Eugene Ragland.)

Q. Was anything said, anything else said at that meeting you can now recall?

A. No, sir. I don't think I can recall any more.

Q. Was there any arrangements made after that meeting to have a further discussion, or was that just left indefinite, or what?

A. Mr. Lysfjord was anxious for another meeting, so he stated. Mr. Baymiller said he would see what he could do to interest his immediate superior in such a meeting.

Q. After this luncheon broke up, did you have any further contacts on this subject with either of the plaintiffs?

A. I discussed the meeting we had just had with Mr. Baymiller. It was agreed upon that we would try to interest Mr. Thompson in a future meeting.

Q. Did you have any discussions with either of the plaintiffs immediately following this last luncheon meeting you have just described?

A. Not immediately afterwards. Mr. Lysfjord, however, called me quite a few times on the telephone, asking to know [777] the results of the possible chance of this future meeting.

Q. Was there any further conference arranged between yourself and the plaintiffs on this subject?

A. Shortly after that initial meeting I spoke of, three weeks, Mr. Lysfjord dropped in our office quite casually, hoping to hurry things along, I am sure.

The Court: Well, we can't have a running interpretation on people's hopes and fears. You tell us what they said.

(Testimony of Robert Eugene Ragland.)

The Witness: He said, in substance, to that effect, he hoped to hurry the third meeting along.

Mr. Thompson wasn't available at that time, nor was Mr. Baymiller. Lysfjord and I went to lunch.

Q. (By Mr. Black): Did you have later a meeting at which Mr. Baymiller or Mr. Thompson or both or either were present?

A. Yes, sir, we did. We had a second Manhattan Supper Club meeting at which Mr. Thompson and Mr. Baymiller and both the Plaintiffs and myself were present.

Q. What is, or what was Mr. Thompson's position?

A. Mr. Thompson is sales manager for the Southwest District for the Pioneer Division of The Flintkote Company.

Q. What was said by the parties that you remember at that luncheon?

A. Introductions were made. Mr. Waldron particularly was introduced, having entered into the picture for the first time. [778]

Mr. Lysfjord, I believe—I know he had a portfolio of jobs he had secured from various contractors, assigned to the Downer Company, through where he was employed—where he was employed.

He presented those papers to Mr. Thompson.

Mr. Thompson thought that was fine, he must be a wonderful salesman, he said, to secure those contracts.

However, he would not be allowed to pursue business in Los Angeles were he to be granted a franchise.

(Testimony of Robert Eugene Ragland.)

We spoke of San Bernardino, Riverside and Imperial Counties as a possibility. I brought that up because I had worked out there many years for The Flintkote Company. I was trying, you understand, to open the door for these two men.

Mr. Ackerson: May we have what you stated, Mr. Ragland.

The Witness: That was it.

Mr. Ackerson: You stated——

The Witness: Yes, sir.

Mr. Ackerson: Go ahead.

Q. (By Mr. Black): Go ahead.

A. That meeting broke up in about an hour's time, after lunch, and Mr. Baymiller, Mr. Thompson and myself decided to do everything we could to——

Q. Just a moment, please. Before we leave this meeting, was anything said at that meeting by Mr. Waldron about anticipated objection by the contractors if the plaintiffs were [779] allowed to operate? A. I don't recall that.

Q. Specifically, did Mr. Waldron say that the dealers were organized and were not competing with each other any more?

A. I don't recall that, either.

Q. Did Mr. Thompson state that no amount of pressure would intimidate The Flintkote Company?

A. No, sir.

Q. Did Mr. Thompson say anything about the company would be pleased to allow the plaintiffs to

(Testimony of Robert Eugene Ragland.)

work in Los Angeles if they also worked in Riverside and San Bernardino?

Mr. Ackerson: Your Honor, I am going to object to this last question; it is very leading. I think the witness should be required to state what——

The Court: It is leading, Mr. Black.

Mr. Black: Well, I think we are entitled to categorically have him answer specific matters.

I agree I should have him state generally first on the subject matter. I will try to cover the field generally, first.

Q. (By Mr. Black): Do you recall whether anything was said by Mr. Thompson with respect to an operation that covered both Los Angeles and Riverside and San Bernardino?

Mr. Ackerson: Same objection, your Honor [780]

The Court: Overruled.

Mr. Ackerson: That is as leading as the other question.

Mr. Black: Oh, no, it isn't.

The Court: It has been overruled, Mr. Black. It is directing the witness' attention to the subject matter he wants to discuss. The other one was, in effect, suggesting the answer; this question was not.

Mr. Black: Would you repeat the question?

(Question read.)

The Witness: Shall I answer that? [781]

Q. Yes.

A. Very definitely. Mr. Thompson never stated "and Los Angeles" to any proposal that we made.

(Testimony of Robert Eugene Ragland.)

Q. Do you recall——

Mr. Ackerson: I don't think that that is responsive. May we have what he did state? I ask that that be stricken as not responsive.

Mr. Black: If the court please, only the proponent of the question can make that objection.

The Court: Not any more, Mr. Black, but I think the answer may stand. The motion is denied.

Either party may object that an answer is not responsive. The way these witnesses have been testifying and the way the questions have been propounded, I will let the answer stand to this question.

Q. (By Mr. Black): Was there anything said at that meeting with respect to specific jobs in the Los Angeles territory?

A. At this second Manhattan Supper Club meeting?

Q. Yes.

A. The particular jobs that Mr. Lysfjord had were all Los Angeles jobs, and Mr. Thompson stated that under no circumstances would they be continued to pursue to such projects as those.

Q. Was there anything said in connection with that [782] subject as to any possible special exceptions?

A. Yes, sir, there was. If the defendants, either one of them, had any——

Mr. Ackerson: Your Honor please, I am going to object to the last question as leading. This witness can state what was said, but I mean after all, if you

(Testimony of Robert Eugene Ragland.)

tell him the subject matter, and so forth, I think it is leading. I object to it on that ground.

The Court: It has been answered.

Mr. Ackerson: The question itself was leading, your Honor. Was anything said about a specific subject matter that is defined in the question I would object to as being a leading question, your Honor.

The Court: I don't think the particular question is leading. Overruled.

Mr. Black: The objection was overruled?

The Court: Yes.

Mr. Black: Will you repeat the last question, please?

(The question referred to was read by the reporter, as follows: "Q. Was there anything said in connection with that subject as to any possible special exceptions?")

The Witness: Mr. Lysfjord said that he had developed several close contacts in the Los Angeles district with various contractors and wouldn't he be allowed to continue with [783] pursuing business in their offices.

Mr. Thompson said no. If and when that occasion arises and you are the only ones that they will give the job to, let us know and we will take a look at it.

Q. (By Mr. Black): Now do you recall anything else that happened at that meeting at this time?

A. I believe that is all I recall, Mr. Black.

Q. What developed in connection with this rela-

(Testimony of Robert Eugene Ragland.)

tionship with the plaintiffs immediately following this second luncheon conference?

A. Mr. Baymiller, Mr. Thompson and myself decided that The Flintkote Company could be bettered by having these two men establish an office for us in San Bernardino, and at our earliest possibility we would present the case to Mr. Harkins for his decision with our recommendations.

Q. Now who was Mr. Harkins?

A. Mr. Harkins was the general sales manager of the Pioneer Division of The Flintkote Company.

Q. Any particular department?

A. Building Materials Department.

Q. Did you arrange such a meeting with Mr. Harkins? A. Yes, sir, we did.

Q. And what took place, if you were present?

A. Mr. Lysfjord and Mr. Waldron came into our office [784] and Mr. Thompson and I took them into Mr. Harkins' office.

Mr. Harkins stated that he was glad to meet them, and that we were glad to have two men of their capabilities handling our acoustical products.

He went on to state the qualities of the particular material. He stated that had they made a survey of the three counties involved, did they think that they could make an adequate living out of that territory.

They said that they were sure that they could.

That was the substance, as I recall, out of that meeting.

(Testimony of Robert Eugene Ragland.)

Q. What, if anything, was done immediately thereafter, if you remember?

A. After that meeting, which was very short in duration, I took Mr. Lysfjord and Mr. Waldron at Mr. Harkins' request over to our credit department, Mr. McAdow, introduced them, and they presented their financial statement to him at that time.

I recall that Mr. McAdow was on the phone on the time we went in and possibly being in the office five minutes, he was on the phone three minutes of that time.

He took the statement, shook their hands, and said, "I will go over this at my first convenience. It is nice to meet you."

Q. Did you have any connection with the plaintiffs' [785] first order of tile from your company?

A. Yes, sir, I did.

Q. State what you did and when you did it and what you recall about it.

A. Mr. Lysfjord and Mr. Waldron came into our office with a purchase order filled out, and naturally they were quite proud of their first order of buying approximately \$6,000 worth of material——

Mr. Ackerson: I am not going to ask that these conclusions be stricken, but maybe you can caution your witness a little bit, Mr. Black.

Mr. Black: Yes.

The Witness: We accepted the order.

Q. (By Mr. Black): Did you have any previous

(Testimony of Robert Eugene Ragland.)

discussions with the plaintiffs prior to the receipt of this order?

A. Yes, sir, I advised them——

Q. How?

A. As to quantities, make-up of a car, what comprised a carload of material, and what products were found that were selling the best, what they should stock. I think that was the general conversation.

Q. Do you recall what time of the day it was that the order was presented to you at the Flintkote office?

A. It was shortly before noon, around 11:00 o'clock in [786] the morning.

Q. What, if anything, did you do after the order was received so far as meeting the plaintiffs is concerned?

A. I took them both to lunch.

Q. Where?

A. At McDonald's Plantation on Firestone and Long Beach Boulevard. It is where we take all of our customers.

Q. Did you have any discussions with the plaintiffs with respect to a cut of the Flintkote emblem for use on stationery or cards or what-not?

A. Yes, sir, I did. I had taken both plaintiffs over to our advertising department, which was down the street a block from our sales department, and introduced them to a Mr. Imlah, who was our publicity man, and he showed them what was available to them in the way of emblems or cuts for their printing matter, and I also showed them the litera-

(Testimony of Robert Eugene Ragland.)

ture that was available to them for their particular products and the samples, how we made up our samples, and what they could expect from us in the way of samples.

Q. Do you recall the arrival of the first shipment of tile that the plaintiffs ordered from the company? A. Yes, sir.

Q. What were the circumstances under which that occurred?

A. Mr. Heller, who had—— [787]

Q. Who is Mr. Heller? What is Mr. Heller's position?

A. Mr. Heller was the head of our insulating board promotional department.

Q. Proceed.

A. Mr. Heller wanted to take a look at the new Safeway job in which our ceiling tile was being applied in San Bernardino, and we also found out from our traffic department that the first shipment of tile was to be delivered to the aabeta company, and we went out together to inspect the Safeway job and also to inspect the shipment of acoustical tile to the aabeta company to see that it arrived in good shape and they were happy with its destination—I don't mean destination—I mean disposition.

We looked around the premises that the aabeta company had set up and I recognized one man they had working for them out there putting in their office, fixing their office up. And then Mr. Waldron, Mr. Heller and myself went to lunch.

The Court: Short recess.

(Testimony of Robert Eugene Ragland.)

(Short recess.) [788]

Q. (By Mr. Black): Just before the recess, Mr. Ragland, we were discussing the first shipment of tile, and its arrival at San Bernardino.

Do you remember what address you went to when it was delivered?

A. I don't recall the number of the street, but it was 9th and Waterman in San Bernardino.

Q. What, if any, equipment was there in connection with the delivery of that tile, automotive equipment?

A. Well, the Waterland truck was there. It had semi-truck and trailer, big rig. I don't recall any other machinery being there.

Q. Did you observe any part of the shipment actually being taken off of the trucks and put into——

A. Yes, sir, the first truck was being unloaded, the first part of the truck was being unloaded when Mr. Heller and I arrived, and it was being stacked in the warehouse.

Q. Do you recall a job for the Owens Roof Company that your company had something to do with?

A. Yes, I do.

Q. About what time, do you recall the circumstances under which that job arose?

A. Yes, sir, I do. Firstly, the Owens Roof Company is a roofing applicator handling Flintkote roofing materials, and they are serviced by Mr.

(Testimony of Robert Eugene Ragland.)

Anderson, a salesman for The [789] Flintkote Company on roofing products.

Mr. Lysfjord and I were in our—in the Flintkote offices and this Mr. Anderson came in one afternoon and stated that the Owens Roof Company wanted to soundproof or sound-condition their front offices, which faced on San Mateo Street, because the streetcar traffic and the general truck traffic was getting a little too annoying, and would we sell them the tile to do the job.

That was a very common request from various Flintkote representatives in the field. They felt, or still do feel, that if they handle one of the Flintkote products they are entitled to buy all of them.

It is our policy to sell such a request through one of our contractors——

Mr. Ackerson: Your Honor please, I object to this, without some foundation.

The Court: Sustained. It wasn't responsive.

You can't tell what your company policy was. You have to tell what was said in respect to these conversations.

Mr. Black: Well, would you give me what was said just before the stricken portion.

(Whereupon, the record was read as follows: "That was a very common request from various Flintkote representatives in the field. They felt, or still do feel, that if they handle one of [790] the Flintkote products they are entitled to buy all of them.")

Q. (By Mr. Black): Mr. Anderson stated, did

(Testimony of Robert Eugene Ragland.)

he, that the Owens Roof people wanted to buy acoustical tile? Was that the occasion for that comment? A. That is right.

Mr. Ackerson: May we have the time and place and parties present? [791]

Mr. Black: I think we have the parties.

Q. It was Mr. Anderson, Mr. Lysfjord and yourself, is that right?

A. Mr. Baymiller was there, too.

Q. About what was the date of that?

A. Between Christmas and New Year's, I believe, to the best of my knowledge.

Q. And what was said in Mr. Lysfjord's presence on that occasion?

A. Mr. Baymiller suggested we call the R. E. Howard Company and have them get in contact with the Owens Roof Company and either sell them the material or sell them the completed installation, material and labor.

Mr. Lysfjord said that he would like to take a chance at that job because he wasn't particularly busy at that time and he felt that——

Mr. Ackerson: I object to it as calling for a conclusion.

The Court: You cannot tell what you felt. You can tell what you said.

Q. (By Mr. Black): Tell what you said?

A. I said to myself——

The Court: No, no. [792]

Q. (By Mr. Black): What did you say to Mr. Lysfjord, if anything?

(Testimony of Robert Eugene Ragland.)

A. To his request I said, "Well, you might go down there and see if you can put that job in for them, and there is an opportunity for you to make some money until you get set up in your own business."

And I believe, I recall Mr. Anderson, Mr. Lysfjord and myself, going down to that Owens Roof Company job.

Mr. Anderson introduced us, Mr. Lysfjord took a look at the job, said he would like to put the job in, and that is all I remember about that.

Q. Did you talk to anybody in the Owens Roof Company yourself on that occasion?

A. I talked to Mr. McLain, Sr., who was the president of the Owens Roof Company at that time.

Q. Do you recall having any discussions with the plaintiffs or either of them about the Lido Club?

A. No, sir, I don't recall anything like that.

Q. Do you know anything about the Lido Club?

A. I know it is an apartment in Hollywood.

Q. Did you have anything to do with installing tile in that place personally?

A. No, sir, I didn't.

Q. Did you know of your company doing so?

A. No. [793]

Q. The answer was no? A. No.

Q. Do you know where you were in the early part of February, 1952?

A. I believe I made a sales trip to Phoenix and Tucson, El Paso and Albuquerque, and I visited

(Testimony of Robert Eugene Ragland.)

San Diego for a week and I was in San Francisco for a week.

Q. And where were you after San Francisco?

A. Portland and Seattle.

Q. And did you return immediately to Los Angeles from Seattle? A. Yes, sir, I did.

Q. Do you recall anything in connection with the aabeta company to your knowledge when you returned to Los Angeles from Seattle?

A. I returned on a Friday night and when I went into the office Monday morning I was told by Mr. Lewis, Mr. Baymiller, that the aabeta company was rumored to be operating in the Los Angeles district and that they had taken several acoustical jobs in the Metropolitan area.

That was the first thing I heard when I went into the office that Monday morning. [794]

Q. What, if anything, did your company do in your presence on that subject?

A. Presently that same morning Mr. Harkins and Mr. Lewis, Mr. Thompson, Mr. Baymiller, and myself had a meeting, and Mr. Harkins directed me to find out if the various rumors we had heard were true. As soon as that meeting was over I started out to do what I was told.

Q. What did you do in that connection?

A. I had a phone number, which was the listed number for the aabeta co., supposed aabeta co. in Bell, which I called and found Mr. Lysfjord present.

I inquired of the address from him and told him,

(Testimony of Robert Eugene Ragland.)

if he could, to wait, I wanted to come over and talk to him; and I went right over.

Q. Who was present?

A. Mr. Lysfjord and Mr. Yeomans.

Q. What did you say and what was said to you on that occasion?

A. Well, I expressed my surprise at finding them set up in——

Mr. Ackerson: Well——

Q. (By Mr. Black): State what you said, as near as possible.

A. I said I was surprised to find them established in that location. That they were not supposed to be there, and [795] and that I had heard that they had taken three jobs, and asked if that were true, which they did not deny.

The Court: What did they say?

The Witness: They said it was true, they had taken the three jobs.

The Court: You see, you answered, you told us something they said they said the first time, they did not deny it. You just left us up in the air, giving us a mixture of confusion and nothing.

So please try to—just take your time and when the question calls for a conversation, tell us what the conversation was, instead of your conclusion on it.

The Witness: The three specific jobs I recall were the Van Nuys Hospital, Community Hospital, and a drugstore in Hawthorne, and Waggoner Real

(Testimony of Robert Eugene Ragland.)

Estate job downtown. These were all confirmed by the plaintiffs to me.

Mr. Lysfjord wanted to know if The Flintkote Company wanted them to go back out to Riverside and San Bernardino, and stay out there, if nothing more would be said.

I stated I didn't know, it wasn't my decision to make that statement at that time. That was the general trend of that first meeting.

Q. (By Mr. Black): Was anything said by Mr. Lysfjord, if you recall, with respect to these particular accounts and the relationship of the abbeta co. to those accounts?

A. Mr. Waldron arrived shortly after I did and this [796] Waggoner Real Estate job was mentioned specifically, and Mr. Waldron said that was a closed account of his, and that he would take all of the work that the Waggoner Real Estate Company, and construction company had. And that no one else could get it, anyway; that I do recall.

Q. Is there anything else you remember about that meeting? A. No, sir.

Q. Did you do any other investigating on your own at that time, to find out about the plaintiffs' activities?

A. I contacted the Contracting Engineers, which were the contractors on the Van Nuys Hospital, I believe, and talked to a Mr. Sharf and asked them—asked him if the aabeta co. was doing all of their acoustical work.

He said no, it was the policy of the Contracting

(Testimony of Robert Eugene Ragland.)

Engineers to give the low bidder all of the contract work.

Mr. Lysfjord had contended that that was another closed account of his, and no one else could do any of their work, anyway. [797]

Mr. Ackerson: Pardon me. Was that the Wagner Company, Mr. Ragland?

The Witness: That was Contracting Engineers at Vernon and Arlington.

Mr. Ackerson: I see.

Q. (By Mr. Black): Did you—pardon me. I didn't mean to interrupt you.

A. Also I went out to Ontario and contacted an architect out there to find out if the abbeta people had been actively engaged in promoting their activities in that district, and found out from Architect Dewey Harnish that they had, that he had received a call from Mr. Waldron.

And I contacted an architect in Riverside, Herman Roanoke, and he also recalled Mr. Waldron being in there.

I talked to Gordon Fields in San Bernardino. I checked over at the Waterman address and found that the company was still there, actively physically there, that material was in the warehouse.

I talked to our various accounts in Los Angeles, finding out for myself a little more what had taken place which I was out of town. They stated that they were not too happy with me for not letting them know about a fourth account in Los Angeles.

I ran down a lead on North Juanita Avenue, a

(Testimony of Robert Eugene Ragland.)

rumor had [798] it that the abbeta company also had an auxiliary office——

Mr. Ackerson: Now, if your Honor please, this is a conclusion too. I don't know what a rumor means here and I will object to it.

The Court: Sustained. There has been an awful lot of hearsay here but no one has been objecting.

Mr. Black: If the court please, I think this is all admissible, not with any idea of proving or disproving the truth or falsity of what he may have been told, but it certainly has a direct bearing on the information on which the defendant acted, and the motives involved in the case.

We are not using it in its hearsay aspects except as to what information was available to the company to actuate that in their dealings with the parties.

The Court: The immediate objection to it was that the witness was stating a conclusion. So go ahead.

Mr. Black: That possibly may be true.

Would you kindly read what was said just before the objection?

(The record referred to was read by the reporter as follows:)

“A. * * * I talked to our various accounts in Los Angeles, finding out for myself a little more what had taken place while I was out of town. They stated that they were not too happy with me [799]

(Testimony of Robert Eugene Ragland.)

for not letting them know about a fourth account in Los Angeles.

“I ran down a lead on North Juanita Avenue, a rumor had it that the abbeta company also had an auxiliary office——”

Q. (By Mr. Black): I take it you were asked by Mr. Harkins or somebody to investigate whether they were operating in that address. Did you do so?

A. Yes, I did.

Q. What did you find there?

A. I found an organization called the Abetter Carpet Cleaning Service, next door to the C. F. Bolster Company.

Q. How long did it take you to make this investigation, if you recall?

A. I spent that whole week on that investigation.

Q. Did you make any report to your superiors with respect to what you found?

A. Yes, sir, I wrote a report to Mr. Harkins, which I was in the habit of doing, stating——

Q. Pardon me. Don't give me the substance of what the report stated. The document will speak for itself.

(Addressing Council): You have a copy of this?

Mr. Ackerson: Yes.

Mr. Black: I will ask that this document be marked for [800] identification.

The Clerk: That will be Defendants' Exhibit I for identification.

(The document referred to was marked Defendants' Exhibit I for identification.)

(Testimony of Robert Eugene Ragland.)

Q. (By Mr. Black): I show you a document, Mr. Ragland, on a letterhead of Pioneer-Flintkote inter-office correspondence, from yourself to Mr. F. S. Harkins, bearing the date February 15, 1952, and I will ask you what that document is.

A. This is my report to Mr. Harkins after that week's investigation.

Q. Was that report made out on the date that it bears?

A. If that is Friday, if that date happens to be a Friday, I am sure it is.

Q. Attached to this report, Mr. Ragland, or stapled to it, is a card marked "Elmer Lysfjord, aabeta company," and also a card "Abetter Floor Service Company."

Mr. Ackerson: Now that I subpoenaed, Mr. Black, and that addenda to that I have never received or seen.

Mr. Black: I am sorry.

Mr. Ackerson: I will ask you to lay a foundation for the cards.

Mr. Black: I am about to.

Mr. Ackerson: All right. [801]

Q. (By Mr. Black): Do you recall those cards in connection with that report, Mr. Ragland? I will ask you to examine this (indicating).

A. I don't recall where I got the Elmer Lysfjord card, but I do recall where I got the Abetter Floor Service card, and that was from this man here, Roy J. Murphy, that ran this organization (indicating).

(Testimony of Robert Eugene Ragland.)

The significance of the Abetter Floor Service was its proximity to the C. F. Bolster Company.

Q. I take it your investigation indicated there was no connection between that floor service company and the plaintiffs?

A. It was just someone had jumped to a conclusion that Abetter and aabeta were the same organization.

Mr. Black: I will offer this document in evidence as Defendant's Exhibit I.

Mr. Ackerson: No objection.

The Court: Received.

(The document heretofore marked Defendant's Exhibit I was received in evidence.)

Q. (By Mr. Black): What, if anything, took place in your company after you presented this report, Mr. Ragland?

A. Shortly after I presented that report Mr. Harkins called Mr. Lewis and Mr. Thompson and Mr. Baymiller and myself into another [802] meeting.

At that time he stated that——

Q. Who did?

A. Mr. Harkins stated that the aabeta co. had broken their gentlemen's agreement to do business in the Los Angeles area, and that he saw no other course of action than to terminate with them as soon as possible.

Q. I think you said they had broken their agree-

(Testimony of Robert Eugene Ragland.)

ment to do business in the Los Angeles area. Do you mean exactly that, Mr. Ragland?

A. Broken their agreement by doing business in the Los Angeles area.

Q. That is what I assumed you meant. What, if anything, did you do following this conference?

A. Mr. Thompson, Mr. Baymiller and myself were directed by Mr. Harkins to go over to the aabeta office in Bell, California, and terminate.

Mr. Thompson was designated as the spokesman for the group. And I called the number and made sure that they were there.

I think Mr. Lysfjord was present, and he said that he would contact Mr. Waldron and have him present.

Q. What was done after that communication?

A. Mr. Thompson, Mr. Baymiller and myself went over to the Bell office and met Mr. Lysfjord and waited possibly ten minutes, until Mr. Waldron appeared. [803]

And at that time Mr. Thompson told both of the plaintiffs that since they had broken their agreement with us, that we were going to have to terminate our association with them.

He also stated that The Flintkote Company would honor any signed purchase orders they might have outstanding, no matter where they were. And no matter what the quantity might be, if it were two feet or two thousand feet or two hundred thousand feet, that we would accept those orders at a carload price. In other words, they would not have to pay

(Testimony of Robert Eugene Ragland.)

more than the carload price for anything outstanding they might have.

Mr. Lysfjord said that he was shocked, but he thanked us profusely for giving them the impetus to get into business for themselves.

That is all I can remember. We left shortly thereafter.

Q. Was there any discussion at that meeting with respect to pressure by the other contractors upon Flintkote Company?

Mr. Ackerson: I object to that as leading, your Honor.

The Court: It can be answered yes or no.

The Witness: No.

Q. (By Mr. Black): Was there any discussion at that meeting to the general effect that the decision to terminate came from higherups in the company?

Mr. Ackerson: Same objection, leading, your Honor. [804]

The Court: Sustained.

Q. (By Mr. Black): Was there anything said with respect to the authority of Mr. Thompson to come to this decision himself, or anything relating to that general subject?

Mr. Ackerson: Same objection.

The Witness: I don't recall.

Mr. Ackerson: Same objection, leading, your Honor.

The Court: Well, it is very difficult, Mr. Acker-

(Testimony of Robert Eugene Ragland.)

son, to direct his attention to a particular subject without leading.

I think the result of the several questions which have been put and the objection sustained to have had, however, the effect of directing the witness' attention to a particular area the counsel would like to have him testify in. Without having further attempts, to avoid the technicality of the question being leading in form, we will ask the witness to go ahead and answer that last question.

The Witness: I don't recall any reference to that, Mr. Black.

Q. (By Mr. Black): Did anybody speak in a loud tone of voice, beyond the ordinary conversational tones, at that meeting?

A. No, the conversation took place at a very normal tone. There were no loud outbursts, or anything like that.

Q. Do you recall whether Mr. Baymiller said anything at that meeting? [805]

A. I don't recall what Mr. Baymiller said.

Q. Prior to the termination did you ever see Mr. Krause at the Flintkote office?

A. No, sir.

Q. Did you see him anywhere else prior to the termination? A. I visited his office.

Q. When did you visit his office?

A. During that week of—when I was directed by Mr. Harkins to investigate these various rumors.

Q. Did he pound on the desk or shout at you at that time?

(Testimony of Robert Eugene Ragland.)

A. No, he was—expressed his disappointment in me.

The Court: What did he say?

The Witness: He said that he was shocked to think that we would start a fourth account in Los Angeles, without at least telling him, or advising him.

Q. (By Mr. Black): Were there any other representatives of the Flintkote contractors at that time present when you saw Mr. Krause?

A. Not at Mr. Krause's office.

Q. Did you see Mr. Howard about that time?

A. I saw him during that week, too.

Q. Was there anybody present at Mr. Howard's office, besides the Howard people?

A. No, sir. [806]

Mr. Ackerson: I don't understand that the witness testified it was in Mr. Howard's office. Let him go ahead, if he did, if that is what he means.

Q. (By Mr. Black): Were there any people from any company, other than the Howard Company, at the time when you saw Mr. Howard?

A. No, sir, there were not. [807]

Q. Was anything said about boycotting the company? A. I don't recall anything like that.

Q. Did you see Mr. Hoppe at that time?

A. Yes, sir.

Q. Where did you see him?

A. In his office.

Q. Did he state, make any statements, about what he proposed to do in connection with the plaintiffs' operations? A. No, sir, he didn't.

(Testimony of Robert Eugene Ragland.)

Q. Did you ever attend any general meeting of the Flintkote contracts on this subject?

A. No, sir.

Q. Was it ever brought to your attention that there was ever such a meeting? A. No, sir.

Q. Did you ever tell the plaintiffs that there was such a meeting? A. No, sir.

Mr. Ackerson: I will object to it as being indefinite, your Honor. I don't know what counsel means by "such a meeting," without the where and when.

The Court: It is overruled, but it is not worth much unless you tell us where it was.

Mr. Black: We are in this position, if the Court please: It has been testified to, over our objection, that Mr. Ragland [808] testified or stated that there was a meeting of the contractors. We deny there was any such meeting. How can we give him the time, place, and circumstances of the meeting when we deny that it existed?

Mr. Ackerson: From the testimony of the plaintiffs that you deny, Mr. Black.

The Court: Do the plaintiffs give a time and place?

Mr. Ackerson: The plaintiffs gave a time and a place, as I recall it, about 30 days before the termination at the Flintkote offices. If he wants to ask about that, I will withdraw the objection.

Mr. Black: I asked him if he ever made such a statement.

Mr. Ackerson: Regarding Krause.

(Testimony of Robert Eugene Ragland.)

The Court: The plaintiffs have limited apparently their theory that there was such a statement made at one time and about the time and place that Mr. Ackerson has stated, so let us get the time and place.

Q. (By Mr. Black): Do you recall making a statement to the plaintiffs, or either of them, about a meeting between various Flintkote contractors and Mr. Lewis of the Flintkote office?

A. A joint meeting of all three contractors?

Q. Yes. A. No, sir.

Q. Do you recall making a statement about that time [809] that Mr. Newport would boycott The Flintkote Company if they didn't stop selling to the plaintiffs? A. No, sir.

Q. Did you ever hear of such a statement?

A. No, sir.

Q. Did you ever attend any meeting of any kind with the other Flintkote contractors with respect to terminating the plaintiffs?

A. No, sir, I didn't.

Q. Was it ever reported to you that such a meeting took place?

A. No, it was not reported to me, if it did.

The Court: Did you ever hear of such a meeting?

The Witness: No, sir.

Q. (By Mr. Black): In the course of your contacts with the plaintiffs during all of this period, Mr. Ragland, did you ever hear of a bid allocating scheme or price fixing arrangement among the acoustical tile contractors in this area?

(Testimony of Robert Eugene Ragland.)

A. No, sir.

Q. Did you know whether The Flintkote Company during the period that we are now discussing sold decorative tile to acoustical tile contractors?

A. No, sir, they did not.

Q. Do you know if they sold wallboard direct to acoustical [810] tile contractors?

A. No, sir, they did not.

Q. What products did your company sell to acoustical tile contractors?

A. Our complete line of acoustical tile products includes four different thicknesses and four different sizes of perforated cane fibreboard, and all four of those were available to any acoustical contractor that we were doing business with.

Q. Was there any other products that were available on a direct basis at that time from The Flintkote Company to acoustical tile contractors from The Flintkote Company?

A. There was one product, an adhesive, Atlas adhesive, a cement used in holding tile to a ceiling. That was offered directly to the acoustical tile contractors.

Q. Was there anything else that was available to them on a direct basis? A. No, sir.

Q. Other than what you have mentioned?

A. No, sir.

Q. Did you ever discuss supplying decorative tile to Mr. Waldron in connection with their proposed operations?

A. I don't recall any discussion like that.

(Testimony of Robert Eugene Ragland.)

Q. Had you seen the aabeta company's office at Bell, California, prior to the time that you went down there in [811] response to Mr. Harkins' request that you make this investigation?

A. No, sir.

Q. Had anyone reported to you prior to your return from Seattle to Los Angeles that the plaintiffs were operating an office in Los Angeles?

A. No, sir.

Q. During this period did you see the plaintiffs rather frequently when they were getting established or starting their operations after the meeting with Mr. Harkins?

A. After the meeting with Mr. Harkins? You mean the termination?

Q. No, when they were taken on as distributors.

A. Yes, sir, I would say I saw them quite frequently.

Q. Where was your home at the time, Mr. Ragland?

A. In Van Nuys near the Birmingham General Hospital.

Q. And what route did you pursue in going home from your office or going to your office from your home?

A. Well, I came along Ventura Boulevard over Cahuenga Pass and that brought me a short block of Mr. Waldron's residence.

Q. Where was Mr. Waldron's residence?

A. It was on Holly Drive near Franklin Boulevard.

(Testimony of Robert Eugene Ragland.)

Q. I interrupted you. Go ahead.

A. Just off of Cahuenga Pass. [812]

Q. What did you say?

A. That location is just off of Cahuenga Pass in Hollywood.

Q. I think I interrupted you. May we have the last sentence?

(The record referred to was read by the reporter, as follows:)

“Q. No, when they were taken on as distributors.

“A. Yes, sir, I would say I saw them quite frequently.”

Q. (By Mr. Black): Where did you see either of the plaintiffs during that period?

A. I would see Mr. Waldron at his residence, usually in the evening going home.

Q. Did you see Mr. Lysfjord in that period very often?

A. Not as frequently as Mr. Waldron. I talked to Mr. Lysfjord occasionally by telephone. [813]

Q. One more question that I perhaps may have not made myself clear on, or whether you answered or not I am not absolutely sure. Maybe you have answered this. If so, Mr. Ackerson will forgive me.

Did you ever see Mr. Krause at the Flintkote office in connection with aabeta co.'s operations?

A. No, sir, I didn't.

Q. Did you ever see Mr. Howard there?

A. No, sir.

Q. Did you ever see Mr. Hoppe there?

A. No, I didn't.

(Testimony of Robert Eugene Ragland.)

Q. Or any other representative of the acoustical tile contractors with whom Flintkote does business?

A. No, sir.

Q. Did you ever see any of those at the office?

A. I never have.

Q. Did you see any other acoustical tile contractor in the Los Angeles area with respect to aabeta co.'s operation at the Flintkote office?

A. No, sir, I didn't.

Q. At any time? A. Never.

Q. During this entire period. A. Never.

Mr. Black: You may cross-examine. [814]

The Court: Further trial of this case is continued until tomorrow at 1:30.

Mr. Black: If the Court please, may I ask the Court's indulgence. In a moment of weakness I accepted a position on a committee that Judge Zeeman is handling for the Welfare Federation, making a study of the welfare program. We are supposed to have a report on it tomorrow at a luncheon.

If it would be possible to meet at 2:00 it would enable me to attend that. It is not any desire of my own.

The Court: Surely, Mr. Black. I am just trying to get these cases——

Mr. Black: This thing is one of these public service jobs and I am afraid it would discommode these people if I couldn't attend, because they are relying on me.

The Court: Further trial of this case is continued until tomorrow at 2:00 o'clock.

(Testimony of Robert Eugene Ragland.)

Mr. Black: I would just as soon operate a half hour later if the jury and Court don't mind.

The Court: We might do that. We will see how we hold up tomorrow.

(Whereupon, at 4:00 o'clock p.m., Monday, May 16, 1955, an adjournment was taken to Tuesday, May 17, 1955, at 2:00 o'clock [815] p.m.)

Tuesday, May 17, 1955, 2:05 P.M.

The Clerk: Case No. 14,350, Elmer Lysfjord v. The Flintkote Company.

Mr. Ackerson: Ready for the plaintiffs.

Mr. Black: Ready for the defendant.

The Court: Let the record show the jury and alternate are present, plaintiffs present and defendant represented.

ROBERT EUGENE RAGLAND

called as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Ackerson: Had you finished direct, Mr. Black?

Mr. Black: Yes.

Cross-Examination

By Mr. Ackerson:

Q. You are now employed with Coast Insulating Products? A. That is correct.

(Testimony of Robert Eugene Ragland.)

Q. Who is the principal owner or maker of Coast Insulating Products, is that Mr. Newport?

A. Mr. William Binford.

Q. Who is Mr. Newport? What connection does he have with it?

A. To my knowledge he has no connection.

Q. He is not an owner? [817] A. No, sir.

Q. To your knowledge has he ever been connected with it?

A. I believe he owned the company at one time.

Q. What time was that?

A. Well, he owned the company, to my knowledge, when Flintkote first started selling him acoustical tile in 1951, until 19—sometime in 1953.

Q. Do you know whether or not he is still the owner, Mr. Ragland? A. I do not know.

Q. So you are not stating he is not still the owner? A. No, sir, I am not.

Q. All right. Now, who else? You said Mr. Binford? A. Yes, sir.

Q. Who else is connected with that company? Who else are your superiors?

A. Mr. Gus Krause.

Q. Mr. Gustav Krause is also there?

A. Yes.

Q. It has been stated in this trial, Mr. Ragland, that there were certain conferences between Mr. Newport and Mr. Krause—I mean with Flintkote and Mr. Newport and Mr. Krause? There is no doubt in your mind they are the same people, is there? [818]

(Testimony of Robert Eugene Ragland.)

A. If those conferences took place, they are undoubtedly—you are referring to the same people that I am, yes, sir.

Q. They all are now or have been connected with your present employer? A. Yes, sir.

Q. Now, I believe you stated on direct examination that you started in back in February of 1951 as an employee of Flintkote, in connection with insulation board products, is that right?

A. That is right.

Q. I believe you stated that by June 1, 1951, the same year, you then took a new position there. What was that, again?

A. That was acoustical tile sales and promotion.

Q. What was your title, if you remember?

A. I really never had a title. Field service engineer was the general classification.

Q. What was the principal duty you had? Wasn't it to sell as much Flintkote acoustical tile as you could, promote Flintkote acoustical tile?

A. In general, that—

Q. That was the main purpose of your job, wasn't it? A. Yes, sir. [819]

Q. Now it was about June and after you became sales promotional man for the Flintkote acoustical tile that you started having these more or less serious conversations with the plaintiff Lysfjord, wasn't it?

A. The more serious ones, yes, sir.

Q. Prior to that I believe you testified that it

(Testimony of Robert Eugene Ragland.)

was conversations with possibilities and desires, and so forth? A. Yes, that is correct.

Q. But when you became promotional agent for acoustical tile for Flintkote on June 1, 1951, then the conversations became serious?

A. Well, there was a degree of seriousness. Let's say I was in a position at that time where I might do more for these defendants than I could before.

Mr. Black: Plaintiffs you mean, Mr. Ragland?

The Witness: Plaintiffs. Excuse me.

Q. (By Mr. Ackerson): In other words, it was your job then, wasn't it, beginning June 1, 1951, that is, it then came into your sphere of operations with Flintkote, didn't it?

A. What came into my sphere?

Q. Well, the sale of acoustical tile. I mean, you were in a position then where you were in the same line they were interested in?

A. Yes, sir. [820]

Q. Is that right? A. Yes, sir.

Q. Now I believe you testified further that you had had a personal relationship with both the plaintiff Lysfjord and Waldron for some years prior to that, dating back to your Shugart Company days, is that right? A. That is right.

Q. And that was both a social relationship?

A. Yes, sir.

Q. And it was a personal relationship, wasn't it? A. Yes, sir.

Q. You saw them at lunches, you called at Mr. Waldron's home frequently on your way to and

(Testimony of Robert Eugene Ragland.)

from your own home? A. Yes, sir.

Q. And that continued on up until when, about the date of this termination meeting you had?

A. On and off, yes, sir.

Q. Quite frequently?

A. Possibly twice a week.

Q. Do you see Mrs. Waldron and her daughter in the courtroom today?

A. I wouldn't recognize her. I know he has a daughter.

Q. But Mrs. Waldron you do recognize?

A. Yes, I do.

Q. You have talked to her many times? [821]

A. Yes.

Q. And played cards with them many times?

A. Not many times, several times.

Q. Several times? A. Yes.

Q. You have been in her home many times?

A. Yes, sir.

Q. Now preliminarily, Mr. Ragland, I would like to ask you—I would like you to think about this answer—I want to ask you how many times you will state that you were over at the Atlantic address of the aabeta company prior to this termination meeting? A. At the maximum I was there twice.

Q. And will you state those two occasions? I imagine you can if it was only two times, couldn't you?

A. I was there the day, the Monday following my return from Seattle, when I was told to go and find the Bell location.

(Testimony of Robert Eugene Ragland.)

Q. And that was about at least within the first two weeks of February of 1952, is that right?

A. Sometime in that period.

Q. Now you are stating that that is the first time you were ever there? A. Yes, sir.

Q. The first time you ever knew the address existed? [822] A. Yes, sir.

Q. Now the second time was the termination meeting, I take it? A. Yes, sir.

Q. And you have never been there since?

A. No, sir. I was there after——

Q. Since the termination meeting?

A. Yes, sir.

Q. And when was that?

A. At the termination meeting Mr. Thompson had told the plaintiffs that Flintkote would allow them a week to 10 days to get in any additional orders they might have, and toward the expiration of that two-week or 10-day period no orders were forthcoming, and I went over, called up and went over, to find out if I might help them along or hurry those orders along. That is another time I was there.

We gave them an extension. They weren't quite ready to submit the orders, the additional orders, and after discussing the situation with Mr. Baymiller we gave them another week's extension on that original 10-day period.

Also I was over there after that meeting I just mentioned more or less on a friendly visit, trying

(Testimony of Robert Eugene Ragland.)

to recommend possibly a place where they might buy some more acoustical tile. [823]

Q. And that was how long after the termination meeting?

A. My second visit, oh, three weeks after the termination.

Q. Did you make a third visit then?

A. I don't recall, I could have, but I don't recall any more.

Q. Have you visited Mr. Waldron in his home since the termination meeting? A. No, sir.

Q. Played cards since then? A. No.

Q. Gotten together socially at all?

A. No, sir.

Q. So you would say prior to the termination meeting you were in that plant and knew of its existence, only because of two visits—I mean one visit prior to the termination meeting?

A. That is correct.

Q. Now, when you first started these conversations with Mr. Lysfjord, I believe you said it was, you had most of the early conversations with him, didn't you? A. That is correct.

Q. Now, they started in a serious vein about June 1st, when you became promotional manager or something in connection [824] with acoustical tile for Flintkote.

Did you indicate to Mr. Lysfjord, in view of your experience, as to his past experience in the field you would like to have him on Flintkote's team?

A. Words to that effect, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. You recognized that he did have contacts, did you not?

A. I recognized that he had a sales ability.

Q. And you recognized that he had spent a number of years here in the Los Angeles area creating good will with general contractors?

A. He had spent the last year or so with the Downer Company.

Q. You knew he was with other—salesman for Shugart prior to that?

A. No, he never was a salesman for Shugart.

Q. You knew he was a salesman prior to the time he came to Downer?

A. No, sir. I don't believe he ever was.

Q. Were you aware he did have a good record as a salesman for the Downer Company?

A. I believed what he told me. He said he had some—

Q. Well, did you know it of your own knowledge?

A. No, sir, I never knew it of my own knowledge; just what he told me. [825]

Q. You did check it later, though, didn't you?

A. To a degree, yes, sir.

Q. You found he was a good salesman, didn't you?

A. I found he had a degree of success, yes, sir.

The Court: Members of the jury, we have had some little colloquy here at times past about leading questions. Just a word about leading questions,

(Testimony of Robert Eugene Ragland.)

for the guidance of the witness, counsel and the jury.

It is the law generally that a person who calls a witness can't ask a leading question. A leading question is one of the type that Mr. Ackerson has just been asking, "You knew he was a good salesman, didn't you?"

All the witness has to do is yes the attorney or take issue with him and say no.

Well, leading questions are not permitted by a lawyer who calls a witness, except in extraordinary circumstances, because the witness ought to tell the story himself.

But now we have come to cross-examination and on cross-examination the rule of law is different. The reason for it is that this man is a witness, is an employee of the defendant. Sometimes a witness being cross-examined isn't an employee of the opposite side, but he, at least, has been called as a witness by that side.

On cross-examination he is being examined by the lawyer for the other side. It just seemed in law that being questioned [826] by the opposite side will put the witness in a position where he won't yes someone, without examining the inquiry pretty thoroughly in his mind, so that he will look out to see he doesn't fall into traps.

Hence, we are allowing the leading questions here on cross-examination. That being one of the immemorial—time immemorial rules of law, that the cross-examiner may ask leading questions.

(Testimony of Robert Eugene Ragland.)

So I just point that out to the jury. I think it was this jury that heard objection sustained to a lot of questions on the ground they were leading, and you might have wondered why we are allowing leading questions to be put by the opposition.

The reason is that it is the opposition and the witness is supposed to be on guard against them. I say that, also, for the benefit of the witness.

So, Mr. Witness, look out, you are being examined by the enemy now.

Mr. Ackerson: I think, Your Honor, you know I wouldn't lead anybody into a trap.

The Court: I don't mean by that it is anything unfair, that there is anything unfair about it.

Mr. Ackerson: I am being facetitious. Forgive me, Your Honor.

The Court: This case is being tried by leaders of the [827] Bar. Mr. Ackerson is considered, from the standpoint of people who bring this kind of suit, probably the leading expert in this part of the country, and Mr. Black, in behalf of the people who defend them, is regarded the same way. They are both lawyers of high integrity and considerable ability in their fields.

Q. (By Mr. Ackerson): Mr. Ragland, sometime subsequently after the termination you did contact the Downer Company, did you not, and inquire about the plaintiff Lysfjord and plaintiff Waldron's activities there? A. Yes, sir.

Q. You found, did you not, upon that inquiry, they were two of the top salesmen down there?

(Testimony of Robert Eugene Ragland.)

A. Yes, sir.

Q. You found their monthly commissions ranged from a thousand dollars upward, didn't you?

A. In that neighborhood, yes, sir.

Q. And you also found, in connection with Mr. Lysfjord, that the Downer Company offered him a much better position if he would stay, didn't you?

A. What do you mean by "a much better position"?

Q. Well, what did you find in that respect? I will let you state it.

A. They didn't want to lose him.

Q. They offered him a better deal if he would stay, [828] didn't they?

A. That is what he told me, yes, sir.

Q. That is what you were told at the Downer Company, wasn't it?

A. No, I don't believe I was told that at the Downer Company. [829]

Q. Now we start out, then, in these preliminary conversations between you and Mr. Lysfjord, that is, prior to this first Manhattan Club meeting that you have stated, have you not, that you did want these two men on the Flintkote acoustical tile team?

A. Yes, sir, I stated that.

Q. And you did feel that they were amply qualified?

A. I felt that.

Q. And would do Flintkote a good job?

A. Yes, sir.

Q. And would aid Flintkote's sale of acoustical tile?

A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. You knew also, didn't you, that the only experience or contacts either of them ever had as salesmen in the acoustical tile field were as salesmen in the Los Angeles field here, didn't you?

A. Yes, sir, I know that is the only place they had worked acoustically.

Q. Well, now, let's take this first meeting, after these preliminary conversations, most of which were had with Mr. Lysfjord. Then after you had been changed to this job as promotional man of acoustical tile for Flintkote, you did arrange this first meeting at the Manhattan Club with Mr. Baymiller, yourself and Mr. Lysfjord, did you not?

A. Yes, I did. [830]

Q. And I believe you stated that that was about September of 1951, and I am not holding you to this exact date? A. It could have been.

Q. It could have been September or October or sometime within 30 or 60 days? A. Yes.

Q. Now you met down there and, as I recall it, you said that the meeting took place during the lunch hour. How long was it, a 2-hour meeting? The lunch hour doesn't mean anything on a business meeting, I know that.

A. Approximately an hour.

Q. There were just three of you there?

A. That is correct.

Q. Now will you state again what you said at the meeting? Did you say anything at that meeting?

A. I introduced Mr. Baymiller to Mr. Lysfjord.

(Testimony of Robert Eugene Ragland.)

I told Mr. Baymiller that I had known Mr. Lysfjord at the Shugart Company. I told him I had heard of his sales activity at the Downer Company.

Q. What did you hear about his sales activity at the Downer Company that you told Mr. Baymiller?

A. I told him from what I had heard he was doing all right.

Q. Did you tell him he was one of the top salesmen down there? [831]

A. I don't believe I used the top salesman terminology. I told him he had turned into a fairly successful salesman.

Q. Did you tell Mr. Baymiller at this first meeting at the Manhattan Club that Mr. Lysfjord had a lot of contacts here with general contractors?

A. No, I don't believe I did.

Q. Did you tell Mr. Baymiller that Mr. Lysfjord had thrown work from the Hayden-Lee Company and Jackson Bros. Company to the Downer Company for the first time?

A. I don't recall that.

Q. You don't know whether you did or you didn't? A. That is right.

Q. Do you know how the Hayden-Lee Company is or what type of company they are?

A. I believe they are designer-builders, architect builders.

Q. Don't you know that they built one of the largest industrial, shall we call it, suburbs out here around Inglewood? A. Tract builders?

(Testimony of Robert Eugene Ragland.)

Q. Yes, tract industrial builders.

A. Well, a tract is not industrial. I thought they were more commercial builders, factory buildings and things like that.

Q. Yes, that is right. [832]

A. That is my understanding.

Q. And do you know that they did a great deal of work in the big area out around Inglewood for the airplane companies and various other industries? A. Hearsay knowledge, yes, sir.

Q. Do you know that those buildings had large amounts of acoustical tile?

A. I never was familiar with any particular job that they had built.

Q. Did you know that Mr. Charles S. Lee, who is the Lee of Hayden and Lee, was also a theater architect and built many theaters? A. No, sir.

Q. You did know, however, that they were important general contractors, didn't you?

A. One of many, yes, sir.

Q. Do you know anything about Jackson Bros. and their activities as general contractors?

A. I knew more about Jackson Bros. because I had contacted them when I was with the Shugart Company.

Q. Now tell us—let me ask you this—isn't it true that they are likewise engaged in commercial buildings of types that use a lot of acoustical tile?

A. Yes, sir.

Q. And didn't Mr. Lysfjord during this first meeting [833] at the Manhattan Club explain that

(Testimony of Robert Eugene Ragland.)

at least those contracts, that he had a good will with, he had sold them many times?

A. He may have said that.

Q. In fact, at this first meeting isn't it true that Mr. Lysfjord, in order to sell himself, was explaining to Mr. Baymiller what he could do in this area with these two clients, among others?

A. I don't believe that was his purpose.

Q. Did he say anything about it? Did he say anything about his ability to sell people like Hayden-Lee and Jackson Bros.?

A. He said that he had the ability to get into offices similar to theirs.

Q. And he had been in their offices and sold them?

A. He had been in their offices, yes.

Q. And he named many other contractors too, didn't he?

A. I don't recall any other names. Those two I do.

Q. But at least in any event, and so far as Mr. Lysfjord's conversation was concerned, he was being the typical salesman to show Mr. Baymiller what he could do in the acoustical tile field by way of selling, wasn't he?

A. Yes, sir.

Q. That was the main reason for him being there, wasn't it?

A. Yes, sir. [834]

Q. And he was there at your instance to let Mr. Baymiller meet him, wasn't he?

A. That is correct.

Q. Because you wanted him on the Flintkote team?

A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. Now tell us again what Mr. Baymiller said at this first meeting at the Manhattan Club.

A. Mr. Baymiller said that he was duly impressed by Mr. Lysfjord's sales ability, and he said that we were completely, all of our outlets were completely, filled right now in the metropolitan Los Angeles area, but we would like to set them up in some location outside of the Los Angeles area. I think Mr. Baymiller did mention Phoenix—in fact, I know he did—and he expressed genuine pleasure in meeting Mr. Lysfjord. [835]

Q. Now, let me ask you a couple of questions along that line.

Did Mr. Baymiller at any time during this meeting ask Mr. Lysfjord if he thought he could continue selling these clients under his own tutelage or his own business? A. No, sir.

Q. I don't believe you stated on your direct examination, but what it was Mr. Lysfjord said, if anything, when Mr. Baymiller is alleged to have said, "How about Phoenix?" Did he say Denver and Seattle and other places?

A. All the other places that have been mentioned were mentioned.

Q. Tell us what Mr. Lysfjord said.

A. Mr. Lysfjord said he would make an investigation and take a trip to Phoenix and see what he thought of it.

Q. What did he say about Denver, Seattle?

A. He said he didn't know anything about them.

(Testimony of Robert Eugene Ragland.)

Q. So your statement is Mr. Lysfjord expressed an interest in Phoenix, anyway, is that right?

A. Yes, sir.

Q. Isn't it a fact that Mr. Lysfjord said that he had been in business only in Los Angeles and he wasn't interested in moving out of Los Angeles?

A. I don't recall that.

Q. You don't know whether he did or he didn't? [836]

A. No, sir.

Q. Well now, in your direct examination I believe you said that Mr. Baymiller at this meeting said or mentioned the terms of Reeder Co., Acoustics, Inc., and Bolstin.

A. Bolster.

Q. Bolster? A. B-o-l-s-t-e-r.

Q. Bolster Company. By the Reeder Company you meant L. D. Reeder, didn't you?

A. Yes, I did.

Q. At that time, in 1951, L. D. Reeder Co. was already in the acoustical tile business, wasn't it?

A. Yes, they were.

Q. What brand of tile did they handle?

A. Armstrong.

Q. Armstrong is a competitive line with Flintkote, isn't it?

A. Yes, sir.

Q. It is A.M.A. approved? A. Yes, it is.

Q. So that if L. D. Reeder Co. got a contract or bid on a contract, as far as Flintkote was concerned, and to use the vernacular, they could thumb their nose at Flintkote tile and put in Armstrong. couldn't they, with equal advantage to them? [837]

A. If the architect would accept it.

(Testimony of Robert Eugene Ragland.)

Q. Have you ever known an architect that would accept Flintkote and not accept Armstrong tile?

A. Yes, sir.

Q. Under what conditions?

A. One of the biggest architects in town, the Welton Becket office today, who have no other acoustical tile except cane fiberboard.

Q. Are there other cane fiberboards?

A. Celotex.

Q. Celotex? A. Yes.

Q. You say today. This architect firm, how long has that been going on? Do you mean to say they specify only fiberboard or only—

A. Cane fiber.

Q. —cane fiber? A. Yes, sir.

Q. How long has that been going on?

A. This is on private work and as long as I have ever known of that organization.

Q. Now, what about public work. Is there any such specification, for only Flintkote tile, that you know of, on public works?

A. On all public work you have to have an approved [838] A.M.A. material.

Q. Any A.M.A.-approved material will meet the specifications, won't it?

A. If it meets what the architect wants.

Q. Yes. But the architect wants an A.M.A.-approved acoustical tile.

A. He may specify a certain absorption at a frequency and if, we will say, one A.M.A. material

(Testimony of Robert Eugene Ragland.)

can't meet it and another one can, he will take the one that does.

Q. All right. Will Flintkote tile meet any different A.M.A. test than any other tile, any other A.M.A.-approved tile, I mean?

A. At certain frequencies, yes, sir.

Q. Did you ever have any sales experiences with The Flintkote Company or with the Shugart Company in connection with public works?

A. In the Shugart Company I handled limited public works in the San Bernardino-Riverside territory.

Q. How many contracts would you say you ever bid on in public works for the Shugart Company?

A. Possibly 15 or 20.

Q. Possibly 15 or 20 public works?

A. Yes, sir.

Q. Then I take it that up until you recently severed your connection with The Flintkote Company, and went to Coast [839] Insulating, that was the limit of your experience with public works?

A. Actively bidding, yes.

Q. Yes. Actively selling. A. Yes.

Q. Now, you also mentioned Acoustics, Inc., at this first meeting, or you said Mr. Baymiller did?

A. Yes, sir.

Q. What type did Acoustics, Inc., sell at that time? What was their contact?

A. They had a contact at that time with the Fir-Tex Company.

(Testimony of Robert Eugene Ragland.)

Q. Fir-Tex is likewise a competitive A.M.A.-approved tile, isn't it?

A. When they make it, yes, sir.

Q. Acoustics, Inc., had that line at the time, didn't they? A. Yes.

Q. Now, the Bolster Company is just a plastering company? They have never been in acoustical tile?

A. Just like Acoustics, Inc.; they are plasterers, too.

Q. But at that time they had had acoustical tile experience with Fir-Tex, hadn't they?

A. Yes.

Q. But the Bolster Company had never been in the [840] acoustical tile business, had they, to your knowledge?

A. Not in the tile business. They applied acoustical plaster and limpet.

Q. By acoustical plaster, do you mean Dry-Wall or something like that?

A. No, I mean a plaster aggregate that foaming agent is added to and they hose it on or it is blown on, and it has the comparable sound-absorption qualities that a tile has.

Q. You would call that of the type or belonging to the family of the acoustical tile?

A. You will see that name in the phone book under Acoustics.

Q. In your knowledge, you would call that type of operation as being in the acoustical tile family, at least, wouldn't you? Is that what you are saying?

(Testimony of Robert Eugene Ragland.)

A. That is an acoustical operation.

Q. And whether you call it tile or not it is an acoustical member of the acoustical family, right?

A. That is right, yes.

Q. Now, at that time, in September or October, 1951, when you and Mr. Baymiller—by the way, Mr. Baymiller's position is what, or was what with the Flintkote Company at that time?

A. He was assistant to Mr. Thompson, assistant sales manager to Mr. Thompson. [841]

Mr. Thompson, in turn, was the sales manager of the Southwest District, which comprises Southern California, from Fresno south, and Arizona, Colorado, New Mexico, and the several counties surrounding El Paso, Texas.

Q. Just so we might clear a little point up here, when you say "Southern California," did Flintkote, as distinguished from Fresno, did Flintkote consider Southern California as any area south of the Tehachapi Mountains? That is a usual designation in a lot of industries. Do they use that?

A. I guess the Chamber of Commerce would have a better connotation of what you mean by that.

Q. Flintkote meant south of Fresno, is that right?

A. Yes, sir, that is Mr. Thompson's territory.

Q. All right. Now, at this time, in September or October, 1951, Flintkote had three Flintkote outlets for acoustical tile, did it not?

A. In the metropolitan Los Angeles district.

(Testimony of Robert Eugene Ragland.)

Q. Well, south of Fresno—or, I will take your statement. In the Los Angeles County.

A. We had three.

Q. Three. And that was Sound Control, Howard—

A. And Coast Insulating. [842]

Q. Now let's take those three. Do you know what competing A.M.A.-approved tile Mr. Howard had at that time?

A. He had U. S. Gypsum and he had Flintkote.

Q. Did he have any others that you know of?

A. No, sir.

Q. As a matter of fact, Mr. Howard has been handling U. S. Gypsum acoustical tile long prior to the time he took on Flintkote, didn't he?

A. That is my understanding, yes, sir.

Q. Now the other one was Sound Control. What other tile did Sound Control handle in September or October of 1951?

A. National Gypsum and Flintkote.

Q. And both of them were A.M.A.-approved?

A. Yes.

Q. Both competitive?

A. Both competitive as far as they went.

Q. All right. On public works, then, both Mr. Howard and Sound Control, as far as Flintkote is concerned, could have turned all their contracts over to National Gypsum and U. S. Gypsum, couldn't they? Or did you have an arrangement, an amicable arrangement, about being fair and dividing the proceeds or something?

A. No, sir. We had no arrangements to my

(Testimony of Robert Eugene Ragland.)

knowledge. They would not be able to turn over all their business, we will say Hoppe to National Gypsum and Howard to U. S. Gypsum, [843] because the two lines I just mentioned are limited in their sizes. Flintkote had made more thicknesses and more of the larger sized units which these two manufacturers did not make.

Q. Well, on that point, Mr. Ragland, can we agree that your principal acoustical tile item, say your most important item, is the 12x12 one-half inch thickness, isn't it?

A. That is the item we sell the most of.

Q. What is the thing you sell the most of next?

A. Three-quarter inch 12x12.

Q. And what is the next important item on your acoustical tile list that you sell?

A. From memory I would say the 24x24 one-inch and half-inch.

Q. Now, does U. S. Gypsum make those three kinds of tile?

A. They make the first two.

Q. The two most important ones they make, you know that?

A. I can't say for sure if they make a 12x12 perforated. They make a slotted, and may make a twin tile which is a 12x24 cross-scored to simulate a 12x12 unit.

Q. It could be substituted for a 12x12 unit that Flintkote makes?

A. It could be substituted, that is right.

(Testimony of Robert Eugene Ragland.)

Q. And you don't know whether they make the actual same [844] model as Flintkote does?

A. That is right.

Q. You don't know that, do you?

A. I can't say for sure whether they do.

Q. Then we can say, can't we, Mr. Ragland, that the Howard Company could have substituted U. S. Gypsum for any contract they had in those three important matters, those three important sizes?

A. Except for the large 24x24 inch size.

Q. And it is your opinion that U. S. Gypsum Company didn't make a 24x24 perforated tile?

A. That is correct.

Q. So that then you are referring to the fact that the Howard Company had to sell at least 24x24 inch Flintkote tile? A. Yes, sir.

Q. Other than that though they could have said—we don't care about Flintkote, we will make a penny more or a penny less on the U. S. Gypsum and we will cut Flintkote out, couldn't they, and there is nothing you could have done about it, was there? A. No, sir.

Q. Now would the same thing be true with Sound Control? A. As to the sizes, yes, sir.

Q. In other words, Sound Control's other source of [845] supply manufactured the same three basic sizes you mentioned?

A. No, they didn't. I don't believe the National Gypsum people make a large size, either, 24x24.

(Testimony of Robert Eugene Ragland.)

Q. But that is the only size that you believe National Gypsum doesn't make?

A. That is right.

Q. Therefore, Sound Control could have substituted at its will National Gypsum tile and ignored Flintkote tile on anything except 24x24, is that right, at least on the three sizes?

A. That is partially right if the architect didn't specify cane fiber.

Q. But you never heard of an architect specifying cane fiber in public works, did you?

A. Oh, yes.

Q. Have you? A. Oh, yes.

Q. Can you name an instance?

A. Or equal?

Q. Or equal? A. Or equal.

Q. But "or equal" is anything that is A.M.A.-approved, isn't it?

A. If it meets what the architect has specified.

Q. But the architect says fiber tile A.M.A. or equal, and [846] I am asking you the "or equal" means a tile that has A.M.A. approval, doesn't it, in public works?

A. Well, you are asking a lot of generalities there. Architects and contractors have differed for years on that "or equal" clause. If an architect so deems that he doesn't like the color of the paint finish or the way the holes are drilled, that they are not clean or the bevels don't run true, he might say, you haven't got an equal even though the material does have an A.M.A. approval.

(Testimony of Robert Eugene Ragland.)

Q. Mr. Ragland, you say he may say that. Name me some particular instance or illustration where an architect has been able to say that and make it stick with the general contractor who let the bid to the acoustical tile contractor. Can you name any instance along that line?

A. I can't name you a specific instance right here now, but I will bring you a nice list.

Q. Where an architect in drawing up specifications for a public building has said, we want fiber tile or equal, and an A.M.A.-approved tile was not acceptable as an equal to the general contractor?

A. Yes, sir.

Q. I would like to have that list, if you have one.

Now, the other Flintkote outlet—we have covered Howard and Sound Control—what about Coast Insulating, your present employer. What other acoustical tile do they handle other than [847] Flintkote?

A. Simpson Logging Company material.

Q. What specifications do they manufacture?

Do they manufacture 12x12 one-half inch?

A. 12x12 one-half inch, and 12x12—

Q. Three-quarter inch?

A. —three-quarter inch.

Q. 24x24?

A. Recently they have started the large sizes.

Q. How recently?

A. To my knowledge, within the last year.

Q. Prior to that then we have the same situation there that as far as Coast Insulating Products is

(Testimony of Robert Eugene Ragland.)

concerned on the two fast moving items, let's say, they could have substituted Simpson tile instead of Flintkote tile, couldn't they?

A. Yes, sir.

Q. And you had no way of making them give you an even break on the sales or anything, did you?

A. Well, to my knowledge we received an equal break. We had no high pressure salesmanship or anything like that. [848]

Q. Do you know how——

Mr. Ackerson: I am not going to move the answer be stricken as not responsive, Your Honor, but I am going to ask it again:

Q. (By Mr. Ackerson): What is your knowledge based on, that you got an even break with Coast Insulating? Do you have any such knowledge, or is that a guess?

A. It would be a guess, based upon the amount of footage we sold to them.

Q. Do you know how much footage Coast sold for Simpson Company? A. No, sir.

Q. So that you then don't really know whether Coast was given Flintkote, or, has given Flintkote a decent break or not, do you?

A. It satisfied our management and our mill is well satisfied with the production.

Q. How do you know your management was satisfied or your mill was satisfied? How do you know? What do you base that statement on?

A. I was told.

Q. Told by whom?

(Testimony of Robert Eugene Ragland.)

A. I was told that—I assume when I am told I am doing a good job that—by my superiors, that our sales are adequate. [849]

Q. But no superior ever told you that, “We are getting an even break with Coast as against Simpson, Howard as against U. S. Gyp or Sound Control as against National Gypsum,” did they?

A. No, not in my presence, anyway.

Q. They never told you that?

A. It never arose.

Q. In the Los Angeles area, did you have any outlet that handled only your own tile, that pushed that exclusively? A. No, sir.

Q. You never have had, have you, to your knowledge?

A. I believe The Flintkote Company once sold Degan & Brodie. That is the only tile they had, to my knowledge.

Q. That was before you came to the company, wasn't it? A. Yes.

Q. Are they still in existence?

A. I believe they are.

Q. They don't handle Flintkote?

A. No, sir.

Q. At any rate, I believe you stated, in effect on direct examination, that they never—and we are not being impolite, but lawyers have a habit of calling people by their last names. It doesn't mean any impoliteness or lack of respect, but we all have that habit and we can't help it.

So, at any rate, Baymiller at this first meeting

(Testimony of Robert Eugene Ragland.)

at [850] the Manhattan Supper Club mentioned these three or four companies, Reeder—the three I mentioned, Reeder, Acoustics, Inc., Bolster Company.

Do you mean to say he placed those—he stated to these plaintiffs that as far as the Los Angeles area was concerned they were ahead of these plaintiffs?

A. That is, in substance, what he meant, yes, sir. Did I mention the Uranga Company?

Q. No, you didn't. What is the company?

A. Uranga.

Q. Uranga? A. Yes.

Q. What is it?

A. It is the name of a man, Henry Uranga, operating in the San Fernando Valley. He was quite persistent at that time.

Q. How did he operate? What did he operate?

A. He operated his own acoustical business.

Q. He had never handled Flintkote?

A. Never had, no, sir.

Q. Did you mention or, did Mr. Baymiller say that Mr. Uranga in the San Fernando Valley would be ahead of these people, too?

A. Yes, sir.

Q. Was anything said? What did you say? [851]

Let's take what Mr. Lysfjord said after Mr. Baymiller is alleged to have said that.

Do you remember what Mr. Lysfjord said?

A. I don't recall specifically. I can give you generalities, but you don't want that.

(Testimony of Robert Eugene Ragland.)

Q. Well, give me the substance of what he said.

A. He was quite agreeable.

Q. He was quite agreeable these people should be ahead of him here?

A. He was agreeable that we were well accommodated in Los Angeles, and he was petitioning us for a supply of material and he was willing to go along with whatever terms we could arrange.

Q. Did he at this meeting, at any time ever state to you, or to Mr. Baymiller, that he wanted to do business any place other than in Los Angeles County, at this meeting? Did he ever state that at this meeting?

A. He stated he would investigate the Phoenix area.

Q. That you are positive of? A. Yes, sir.

Q. All right. Now, do you know when Acoustics, Inc., started in the acoustical tile business, Mr. Ragland? That was a plastering concern, too, wasn't it?

A. Yes, it was.

Q. Do you know when they started in the acoustical tile [852] business?

A. I would venture a guess; sometime in 1950.

Q. Very late, wasn't it? Only about a year before these people tried to get in, wasn't it?

A. I guess that is true.

Q. Do you know what tile they handled when they first started?

A. They had no acoustical tile when they started. They had this sprayed-on material that I mentioned that Bolster had, another brand. They had a product called Insulrock.

(Testimony of Robert Eugene Ragland.)

I will ask the question: Did he ever tell you, or to your knowledge, anybody of Flintkote that he would quit handling Flintkote if these people continued in business? By "these people" I mean the plaintiffs. [855]

A. No, he didn't tell me that.

Q. Well, to your knowledge did you hear that he told that to Mr. Lewis down there or Mr. Thompson?

A. No.

Q. Or Mr. Baymiller?

A. No, sir, I didn't.

Q. Or Mr. Harkins?

A. No.

Q. When did Mr. Hoppe quit handling Flintkote?

A. I would say toward the end of 1952.

Q. And after Mr. Hoppe—are you sure of the date? And have you any better estimate than that?

A. No, I am not sure of the date. It seems to me that that was—that is pretty accurate, though. [856]

Q. You don't know whether the last order he placed, you don't know the date of the last order he placed with Flintkote, do you?

A. No, I don't.

Q. Well, let's get on to the meeting again at the Manhattan Club, the first meeting between you, Baymiller and Lysfjord. Have you stated in your cross-examination all you remember about Baymiller's, yours or Lysfjord's conversation there?

A. I believe I stated everything that I can recall anything specific about.